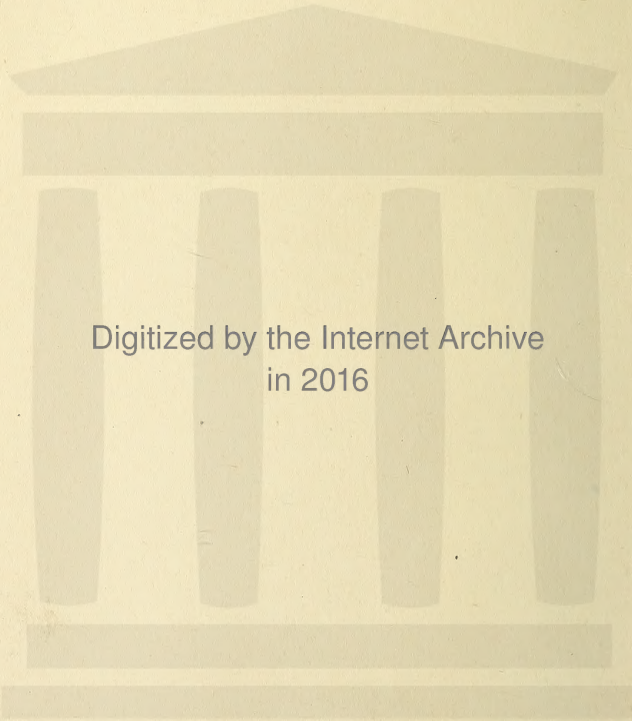


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ONTARIO PRACTICE REPORTS.

REPORTED BY
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BARRISTER-AT-LAW.

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ERRATA

Page 16. Head lines, and head note, last line, for “Rule 162 (b)” read “Rule 162 (3).”

Page 119. Line 8 from end of head note strike out the words “under the Common Law Procedure Act then in force.”

ONTARIO PRACTICE REPORTS.

HILLS V. UNION LOAN AND SAVINGS CO.

Discovery—Inspection of Buildings—Occupation of Tenants—Rule 571.

Rule 571, though not so limited in express terms, must be construed so as to be confined to cases in which the property of which inspection is sought is in the possession, custody, or control of the party against whom the order is desired.

The plaintiff sued for damages for breaches of the covenants to repair and to leave the premises in good repair contained in a lease from her to the defendants' assignor, for which she claimed that the defendants were answerable. The defendants were mortgagees of the lease, and had not themselves been in the actual occupation of the premises. At the time of the action the buildings and premises in question were not in the occupation of the plaintiff, but in that of her tenants:—

Held, that an order for inspection by the defendants should not be made.

[July 14, 1899.—*Meredith*, C.J.]

AN appeal by the plaintiff from so much of an order made by the Master in Chambers on the 27th June, 1899, as directed that, after the delivery by the plaintiff of certain particulars, which she was by the same order directed to deliver, the defendants, their servants, agents, and proposed witnesses, should be at liberty to inspect the buildings and premises mentioned in the order, for the purpose of preparing for the trial of the action, "not more than two witnesses of each trade of which the work is complained of to attend."

Rule 571: A party in a cause or matter may apply to the Court or a Judge for an order for the inspection by the jury or by himself or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute, and the Court or a Judge may make such order upon such terms as to costs and otherwise as the Court or Judge may think fit.

The facts are stated in the judgment.

The appeal was heard by MEREDITH, C.J., in Chambers, on the 30th June, 1899.

H. D. Gamble, for the plaintiff.

W. E. Middleton, for the defendants.

Judgment was delivered on the 14th July, 1899.

MEREDITH, C.J.—The order was made on the application of the defendants under Con. Rule 571, the affidavit filed in support of it being that of Mr. Middleton, one of the solicitors for the defendants, in which all that is stated is that he is advised and believes that it is important that, after particulars have been given so that it may be known exactly what is complained of, the defendants should be allowed to inspect the property in question for the purpose of preparing their evidence at the trial. It may be open to question whether the affidavit is not too vague and general in its terms to justify the making of an order for inspection, though upon the facts stated upon the argument the case seems to me to be a proper one for making such an order, if it be proper to make it where the buildings and premises inspection of which is sought are not in the occupation of the party against whom it is desired to obtain it.

The plaintiff sues to recover damages for alleged breaches of the covenants to repair and to leave the premises in good repair contained in a lease from her to the defendants' assignor, for which she claims that the defendants are answerable.

The defendants were mortgagees of the lease, and not themselves in the actual occupation of the premises, and it is, I think, not unreasonable that, if the practice warrants it, they should be permitted to inspect the buildings and premises in respect of which the breaches of the covenants are alleged to have been committed, with their witnesses, so that they may be in a position, if they can do so, to meet the claim which the plaintiff sets up, particulars of which she has been directed to deliver.

It is, however, objected that the buildings and premises are not in the occupation of the plaintiff, but in that of her tenants, and that there is no warrant for the making of an order in these circumstances.

Apart from authority, it would seem to me that the Rule, though not so limited in express terms, must be construed so as to be confined to cases in which that of which inspection is sought is in the possession, custody, or power of the party against whom the order is desired. I agree with the view expressed by Mr. Justice Wills, in *Straker v. Reynolds* (1889), 22 Q. B. D. at p. 265, dealing with an analogous question, that, had it been the intention to render property in the hands of third parties liable to inspection, the Rule would have contained express words to that effect.

It cannot, in my opinion, have been intended to authorize the making of an order the enforcing of which would necessitate an interference with the possession of a stranger to the litigation, not being an agent or mere servant of the party to it, and an order ought not, I think, to be made where that of which inspection is sought is not in the possession, custody, or power of one of the litigants, on the chance that the person in possession will permit the inspection to take place. The Court ought not, as was said by Pollock, C.B., in *Patent Type Founding Company v. Lloyd* (1860), 5 H. & N. at p. 195, to use a power which it has for the purpose of compelling parties to submit to that which it has no power to order; and, if the person in possession is willing to permit the inspection to be made, the making of an order is an unnecessary thing and a useless expense. See, also, *Reid v. Powers* (1884), 28 Sol. J. at p. 654, *per* Field, J.

Con. Rule 571 was originally sec. 172 of 19 Vict. ch. 43 (the Common Law Procedure Act), and was taken from the English Act 17 & 18 Vict. ch. 125, sec. 58.

Its provisions as to inspection are but an extension to the common law courts of the powers which courts of equity possessed and frequently exercised: see *United*

Company of Merchants of England, Trading to the East Indies v. Kynaston (1821), 3 Bligh 153, and the cases in the notes to it, and the note to *Patent Type Founding Co. v. Lloyd* (1860), 5 H. & N. at p. 201; though it was in consequence of the report of the common law commissioners, recommending that the principle of the English Patent Act, 15 & 16 Vict. ch. 83, sec. 42, should be extended to all cases, that the provisions for inspection found a place in the Common Law Procedure Act.

By 15 & 16 Vict. ch. 83, sec. 42, power was given in actions for the infringement of letters patent to make such orders for an injunction, inspection, or account, and to give such direction respecting the action, injunction, inspection, and account, and the proceedings therein respectively, as to the Court or Judge might seem fit.

It will be observed that this section, like the one of the Common Law Procedure Act, is general in its terms, and contains no express requirement that the subject of which inspection may be ordered be in the possession of a party to the action.

In *Garrard v. Edge* (1889), 37 W. R. 501, Mr. Justice Kay refused an application by the plaintiff for an order requiring the defendants to produce for inspection certain dies, models, and drawings not in the possession, custody, or power of the defendants, and on appeal his order was affirmed, Lord Justice Lindley saying that, in his opinion, the Court ought not to make an order which was in effect one for production and inspection whenever, if ever, the dies, models, and drawings should come into the possession, custody, or power of the defendants. While this decision is not on the very point raised by this appeal, it and the language of the Judges indicate that it was treated as beyond question that an order ought not to be made where that of which inspection is desired is not in the possession, custody, or power of the party against whom the order is asked.

In all of the equity cases to which reference has been made, the subject of the inspection which was ordered was

in the possession of the party against whom the order was asked.

Con. Rule 1096—which in its original form was taken from the English Judicature Act, and is now found in those Rules as Rule 3, Order 50—deals also with the subject of inspection, and in terms enables the Court or a Judge, for the purposes of any inspection ordered, to authorize any persons to enter upon or into any land or building in the possession of any party to a cause or matter.

Rule 571—except so much of it as relates to inspection by the jury, which forms Rule 5 of Order 50—is not to be found in the English Rules, and it probably found a place in our Rules owing to the provisions of Con. Rule 1096 being overlooked when Rule 571 was under consideration.

I have dealt with the case on the assumption that the plaintiff is not in the possession of the buildings and premises of which inspection has been ordered; though that is not shewn to be so by the affidavits filed on the motion, I understood that it was conceded on the argument to be the case. If there is any question as to this, the matter may be spoken to again, if the defendants desire it, and signify that desire to the clerk in Chambers within ten days; and, subject to this, the appeal will be allowed and the order of the Master in Chambers varied by striking out so much of it as is appealed from; and the costs of the appeal will be costs to the plaintiff in any event.

WINTEMUTE V. BROTHERHOOD OF RAILWAY TRAINMEN.

Appeal—Court of Appeal—Stay of Proceedings—Removal of—Security for Costs—Rules 826, 827—Costs of Unsuccessful Motion.

Upon an appeal to the Court of Appeal, upon security for costs being allowed, in general the proceedings ought to be stayed; but if it is made to appear in any case that the respondent may suffer injustice by his execution being stayed, then the stay may be removed, upon terms which may be just to both parties: Rules 826, 827.

The plaintiff recovered a money judgment against the defendants, a benevolent society incorporated in a foreign country, but having members in Ontario who paid dues and assessments which were transmitted abroad. The defendants appealed from the judgment to the Court of Appeal, and gave security for costs. Upon an application by the plaintiff under Rule 827 to remove the stay of proceedings it was admitted by the defendants that they had no assets in Ontario, but they said that they were advised that they had good grounds for the appeal, and if it should fail, that the plaintiff's claim would be paid; and this was not contradicted:—

Held, that the dues and assessments of members in Ontario, being voluntary payments, could not be reached by a receiver or by attachment; and there was no prejudice or injustice that the plaintiff was likely to suffer by the stay, as he already had security for costs, and the delay would be compensated by interest on the judgment, if the appeal should be unsuccessful.

Boyd v. Dominion Cold Storage Co. (1897), 17 P. R. 545, distinguished. *Held*, also, that the costs of the unsuccessful motion should be paid by the applicant; there is no rule that costs of such a motion shall go to the successful party upon the appeal.

[July 13, 1899.—*MacLennan*, J.A.]

MOTION by the plaintiff, who had recovered a judgment on a death benefit claim for \$1,300, to be relieved from a stay of proceedings pending an appeal by the defendants to the Court of Appeal. The facts are stated in the judgment.

The motion was heard by MACLENNAN, J. A., in Chambers, on the 11th July, 1899.

F. E. Hodgins, for the plaintiff.

J. H. Moss, for the defendants.

Judgment was delivered on the 13th July, 1899.

MACLENNAN, J. A.—The defendants have given security for costs pursuant to Rule 826, whereby under Rule 827 the execution of the judgment is stayed. The defendants

are a benevolent society, incorporated in Illinois, but they have a good many members in Ontario, who pay their dues and assessments as required by the constitution and by-laws, and their dues and assessments are transmitted to the secretary-treasurer in Illinois, by whom claims are paid. The society has no funds or property in Ontario other than as above stated. The plaintiff's solicitor in his affidavit says that one object of getting rid of the stay of proceedings is that the plaintiff may be allowed to have a receiver appointed.

The defendants' secretary-treasurer, while admitting that the defendants have no assets in Ontario, says the company are advised that they have good grounds of appeal, but that if the appeal fails the claim will be paid.

Rule 827 says that in a case like this, upon security for costs being allowed, execution shall be stayed pending appeal unless otherwise ordered by the Court or a Judge; but that, upon special application, the Court or Judge may order that execution shall not be stayed except upon such terms *as may be just*.

I think these last words are the key to the interpretation of the Rule. It means to say that in general the proceedings ought to be stayed; but if it is made to appear in any case that the respondent may suffer injustice by his execution being stayed, then the stay may be removed, upon terms which may be just to both parties.

Now, in this case, I can see no prejudice or injustice which the plaintiff is likely to suffer by the stay of execution. It is admitted that there is nothing within the jurisdiction which could be taken in execution; nor does it appear that the dues or assessments of members within Ontario are other than voluntary payments, like premiums of life insurance, and which could not therefore be reached either by a receiver or by garnishment proceedings. Besides these circumstances, there is the statement by the secretary-treasurer that if the appeal fails the claim will be paid, which is not contradicted.

Mr. Hodgins pressed me with the case of *Boyd v.*

Dominion Cold Storage Co. (1897), 17 P. R. 545, as analogous to the present, but I think that a very different case. If this was a question of the costs of the appeal, that case would be quite applicable; but here the plaintiff has got security for costs, the only prejudice which, so far as appears, he can suffer by the appeal, unless mere delay, which is inevitable, and which will be compensated by interest on the judgment, if the appeal should not be successful.

Mr. Hodgins^a also urged that, even if his motion should not be granted, the costs should be costs in the appeal; that such was the rule. I do not think the cases cited by him^{*} support that proposition. It is a motion which fails, and as a general rule the successful party should have costs.

Motion dismissed with costs.

^{*} *Burdick v. Garrick* (1870), L. R. 5 Ch. 453; *Adair v. Young* (1879), 11 Ch. D. 136; *Holmsted & Langton*, 2nd ed., p. 1003.

JANE BENNER V. EDMONDS.

Settlement of Action—Setting Aside—Counsel—Solicitor—Costs.

Where counsel, acting upon the instructions of the plaintiff's solicitor, effected a compromise of the action not authorized by the plaintiff and contrary to the express instructions given by her to the solicitor, the compromise was set aside and the plaintiff allowed to proceed to trial, but, as the plaintiff and defendant were innocent parties, without costs to either against the other.

Stokes v. Latham (1888), 4 Times L. R. 305, followed.

[July 7, 1899.—*Divisional Court.*]

AN application by the plaintiff to set aside an agreement for compromise entered into at the trial, which resulted in the withdrawal of the record, and for leave to bring the action on again for trial, upon the ground that the compromise was effected by the solicitor and the counsel then acting for the plaintiff, without her authority and against her express instructions. The facts are stated in the judgment of MEREDITH, C.J.

The motion was heard by a Divisional Court composed of MEREDITH, C.J., and ROSE, J., on the 6th April, 1899.

Logie, for the plaintiff, referred to *Watt v. Clark* (1887), 12 P. R. 359; *Lewis's v. Lewis* (1890), 45 Ch. D. 281.

Lynch-Staunton and *E. F. Lazier*, for the defendant, opposed the motion and cited *Wright v. Soresby* (1834), 3 L. J. N. S. Ex. 207; *Matthews v. Munster* (1887), 20 Q. B. D. 141; *Swinfen v. Swinfen* (1856), 18 C. B. 485; *Roscoe's N. P.*, 16th ed., p. 277.

Logie, in reply, cited *Hickman v. Berens*, [1895] 2 Ch. 638.

Judgment was delivered on the 7th July, 1899.

MEREDITH, C.J.—This action, which was one of slander, having been entered for trial at the last Hamilton Winter Assizes, an agreement was come to by counsel for the com-

promise of it, which resulted in the record being withdrawn.

The plaintiff now moves to set aside the compromise and for leave to bring her action on again for trial, upon the ground that the compromise was unauthorized, and was entered into contrary to her express instructions.

It is shewn by a number of affidavits, including the affidavit of the plaintiff herself, that the only compromise which she consented to agree to was one by which she should receive from the defendant a complete retraction of the defamatory statements of which she complained; the motion by way of appeal which the defendant had made against the judgment pronounced against him in another action for libel brought by the plaintiff's daughter against him should be abandoned; and the costs of that, as well as of this, action be paid by the defendant.

It is also shewn that these terms were stated by the plaintiff's solicitor to her as those on which the compromise was to be made, and in effect the plaintiff gave to her solicitor instructions not to compromise except upon those terms.

The statements of the plaintiff and of the deponents who corroborate her account of the matter are not contradicted, and the solicitor has not made any affidavit for the purposes of this motion.

The compromise agreed to by counsel did not provide for the abandonment by the defendant of his appeal in the other action, and no retraction was signed by the defendant, although a memorandum was drawn by counsel shewing what the form of it was understood to be, which the plaintiff's solicitor, according to the affidavit of the defendant's solicitor, which is uncontradicted, did not insist on being signed, and perhaps consented to accept as having been agreed to, and without the defendant's signature being required to be subscribed to it. The defendant, however, before this motion was launched, offered to sign it.

Had the only question been as to the form in which the

retractation was drawn, this motion must, I think, have failed, because the form of it was, in my opinion, necessarily on the plaintiff's instructions, left to be determined by the discretion of her solicitor.

Had the plaintiff's counsel acted of his own motion in agreeing to the compromise to which he assented, without knowing what had taken place between the plaintiff and her solicitor, a different question would be presented for consideration, but here counsel acted upon the instructions of the solicitor, and the case is brought within the authority of *Stokes v. Latham* (1888), 4 Times L. R. 305, where a compromise entered into under circumstances very similar to those which exist in this case was set aside.

Following that case, I think the relief which the plaintiff asks must be granted; but, as the plaintiff and defendant were innocent parties, I would follow what was done in that case for that reason, and give no costs to either party of this motion, and neither party should be entitled to any costs of the last trial.

ROSE, J.—There seems to be no room for doubt upon the authorities as to the plaintiff's right to have the judgment set aside.

Lewis's v. Lewis (1890), 45 Ch. D. 281, cited by Mr. Logie, is clear, and in it Kekewich, J., points out that *Matthews v. Munster* (1887), 20 Q. B. D. 141, relied upon by Mr. Lynch-Staunton, was a case where counsel acted upon general instructions, while in the case before him the instructions were specific. See also *Hickman v. Berens*, [1895] 2 Ch. 638, and *Watt v. Clark* (1887), 12 P. R. 359.

I agree that there shall be no costs either of the former trial or of this appeal.

WALKER V. GURNEY-TILDEN CO.

Costs—Recovery Against Opposite Party—Liability to Solicitor—Indemnity.

If the client be not liable to pay costs to his solicitor, he cannot recover these costs against the opposite party.

Jarvis v. Great Western R. W. Co. (1859), 8 C. P. 280, and *Meriden Britannia Co. v. Braden* (1896), 17 P. R. 77, followed.

This rule applied to a case where the defence to an action for damages for personal injuries sustained by a workman in the employment of the defendants was undertaken by a guarantee company who had contracted to indemnify the defendants against such claims, and who employed their own solicitors to defend the action, exercising a right given by the contract; and extended, beyond the actual costs of the defence, to subsequent costs arising out of an application made by the plaintiff's solicitors, where the defending solicitors continued to act upon the retainer of the guarantee company.

[June 28, 1899.—*Meredith*, C.J.]

AN appeal by the plaintiff's solicitors from the taxation by the junior taxing officer at Toronto of the defendants' costs of a motion by the solicitors to the Court of Appeal for leave to appeal to that Court from an order pronounced by a Divisional Court (18 P. R. 274) on an application by the solicitors for an order for payment by the defendants of the solicitors' costs of the action. The motion to the Court of Appeal was dismissed with costs to be paid by the plaintiff's solicitors to the defendants (18 P. R. 471). The plaintiff's solicitors, however, objected to such costs being taxed, upon the ground that the defendants were not liable to their own solicitors for such costs, by reason of the circumstances set out in the judgment, and therefore could not recover them from the plaintiff's solicitors. The taxing officer overruled the objection and taxed the costs, and the plaintiff's solicitors appealed.

The appeal was heard by MEREDITH, C. J., in Chambers, on the 26th June, 1899.

Washington, for the appellants.

J. H. Denton, for the defendants.

The cases cited are collected in *Meriden Britannia Co. v. Braden* (1894-6), 16 P. R. 346, 410, 17 P. R. 77.

Judgment was delivered on the 28th June, 1899.

MEREDITH, C. J.—The contention of the solicitors before the taxing officer and before me on the argument was that, in the circumstances of the case, the defendants had not incurred or become liable to the solicitors who acted for them in the defence of the action, and in the various proceedings incident to or arising out of the application of the plaintiff's solicitors for the order which they sought to obtain for payment by the defendants of their costs of the action, for their costs of the defence or of these proceedings.

The action was brought by the plaintiff, who was a workman in the employment of the defendants, to recover damages for personal injuries sustained by him, as he alleged, owing to the negligence of the defendants.

The London Guarantee and Accident Company contracted with the defendants, subject to certain conditions, to indemnify them, to the extent named in the contract, against any liability which, during the currency of the policy issued to the defendants and evidencing the contract between them and the company, the defendants should incur to their employees by virtue of the common law or of any statute.

One of the conditions of the policy provides as follows :—

“If any legal proceedings be taken to enforce a claim, the company shall, at their own cost and expense, have the absolute conduct and control of defending the same throughout in the name and on behalf of the employer.”

The evidence adduced on the motion shewed, I think, that Messrs. Pearson and Denton, the general solicitors of the London Guarantee and Accident Company, who acted as solicitors for the defendants in the action and in the proceedings by the plaintiff's solicitors to which I have referred, were retained not by the defendants but by the company, the company having exercised the right for which it had stipulated by the condition of the policy which I have just set out, of undertaking the defence of

the action, and that the defendants never came under a liability to the solicitors for the payment to the solicitors of any costs, either of the defence or of the proceedings by the plaintiff's solicitors.

This state of facts brings the case within the rule which was applied by the Court of Common Pleas in *Jarvis v. Great Western R. W. Co.* (1859), 8 C. P. 280, and more recently by the Court of Appeal in *Meriden Britannia Co. v. Braden* (1896), 17 P. R. 77, which is stated by Chief Justice Draper in the first of these cases to be well settled, and to be "that if the client be not liable to pay costs to his attorney, he cannot have judgment to recover those costs against the opposite party:" p. 285.

The test to be applied is whether the solicitor could maintain against the party claiming the costs an action to recover them: *per* Draper, C.J., in *Jarvis v. Great Western R. W. Co.*, at p. 288; and *Humphreys v. Harvey* (1834), 1 Bing. N. C. 62.

I was during the argument inclined to think that, inasmuch as the costs in question were awarded upon the application of the solicitors for the plaintiff, and were not costs of the defence of the action, the rule might not be applicable; but I am unable, on further consideration of the facts, to reach that conclusion. The evidence shews that the settlement of the plaintiff's claim upon which the solicitors' application was based was carried out through the intervention of the company, and that the company was to "stand behind" the defendants as to any claim which might be attempted to be made by the plaintiff's solicitors against the defendants to compel them to pay their costs of the action. The solicitors who acted in the defence of the action continued to act upon the retainer of the company, not of the defendants, and for the costs in respect of these proceedings the company, and not the defendants, were to be liable to the solicitors.

The affidavit of Mr. Denton appears to me to disclose such a state of facts as to the relations between his firm and the defendants as to bring the case within the rule to which I have referred.

Some of the cases—those relating to costs of uncertificated attorneys—seem to recognize, as exceptions to the rule, cases in which the party for whom the solicitor acted, though not under a legal, was under a moral, obligation to pay the costs, where it was not shewn that the client had refused to pay the solicitor; but the exception, if it exists, can have no application here, for if, as I have concluded, there is no legal obligation resting on the defendants to pay the costs which are in question, the reason for coming to that conclusion equally excludes the existence of a moral obligation to do so.

The appeal must therefore be allowed, but, under all the circumstances, it should, I think, be without costs, and there will therefore be no order as to costs.

HOFFMAN V. CRERAR ET AL.

Judgment—Default—Writ of Summons—Special Indorsement—Nullity—Abandonment of Action—Joint Contractors—Release of Some after Judgment—Effect of—Costs.

[September 7, 1899.—Divisional Court.]

AN appeal by the plaintiff from the order of ARMOUR, C. J., in Chambers, (18 P. R. 473), reversing an order of the local Judge at Stratford and setting aside judgments signed against certain of the defendants.

The appeal was heard by a Divisional Court composed of MEREDITH, C. J., and ROSE, J., on the 7th September, 1899.

D. L. McCarthy, for the plaintiff, supported the appeal.

J. H. Moss, for the defendants, undertook to pay to the plaintiff the sum required to make up \$116 when added to the sums already received by the plaintiff from some of the defendants.

MEREDITH, C. J.—This undertaking removes the only objection to the order, which should be affirmed on the plain ground that the plaintiff has been or will be paid the whole amount to which he is entitled. The appeal will be dismissed, but the order below will be so varied as to make it plain that the plaintiff has the right to proceed for his costs of the action. There will be no order as to the costs of the appeal.

ROSE, J., concurred.

RE CONFEDERATION LIFE ASSOCIATION AND
CORDINGLY ET AL.

Interpleader—Summary Application—Rule 1103 (a)—Insurance Moneys—Adverse Claims—Foreign Claimants—Notice of Motion—Service out of Jurisdiction—Rule 162 (b).

Certain moneys were payable by an insurance company under several life policies in favour of the assured, his executors, administrators, or assigns. The moneys were claimed by the executors, who resided in Manitoba, where the assured died, and who were threatening suit there, and also by the widow, who resided in Quebec, and had brought an action against the company there. The company's head office was in Ontario, and they launched an application in the High Court for a summary interpleader order:—

Held, reversing the decision of MEREDITH, C.J., that they were not entitled to avail themselves of the provisions of Rule 1103 (a), as persons under liability for a debt in respect of which they were, or expected to be, sued by two or more persons, because no action was brought or threatened within Ontario; and therefore service out of Ontario of the company's notice of motion for the interpleader order should not have been allowed under Rule 162 (b) or otherwise.

[July 14, 1899.—*Meredith, C.J.*]

[September 11, 1899.—*Divisional Court.*]

THIS was an appeal by Sarah Elizabeth Langridge from an order of the Master in Chambers refusing to set aside his own order allowing service to be effected on her in Montreal of a notice of motion by the association for an interpleader order as to certain moneys payable by the association under several policies of insurance effected by one Abraham Harris, deceased, with the company on his

life, and which by the terms of the policies were payable to the insured, his executors, administrators, or assigns. The facts are stated in the judgment.

The appeal was heard by MEREDITH, C. J., in Chambers, on the 26th June, 1899.

J. J. Maclaren, Q.C., for the appellant.

Snow, for the Confederation Life Association.

Re Benfield and Stevens (1896-7), 17 P. R. 300, 339, was referred to, in addition to the cases cited in the judgment.

Judgment was delivered on the 14th July, 1899.

MEREDITH, C. J.—The insured died in Manitoba, where he resided at the time of his death, and a claim to the insurance moneys payable in respect of certain policies of insurance on his life issued by the company, has been made by his executors, who have obtained probate of his will in that Province, and are suing or threatening to sue the company there to recover the moneys payable according to the terms of the policies. The executors reside in Manitoba.

The appellant, Sarah Elizabeth Langridge, is the widow of Harris, and she claims to be entitled to, and has brought an action against the company in the Superior Court of the Province of Quebec at Montreal to recover one-half of the insurance moneys.

The company has not objected to the jurisdiction of the Superior Court, and, according to the law of Quebec, it is now precluded from raising any question founded on the absence of jurisdiction.

The head office of the company is at Toronto.

The important question as to the right of a debtor to require conflicting claimants to a debt which he owes, who reside out of the jurisdiction of the High Court of this Province, and are proceeding to enforce their alleged rights against him in a foreign Court under the provisions

of the Consolidated Rules as to interpleader, and as to the jurisdiction of the Court to require such claimants to submit their claims for adjudication in such proceedings, was the principal question discussed by counsel on the argument before me.

If the question were to be decided apart from the provisions of Con. Rule 162 (3), I should hold that there is no jurisdiction in the Court to allow proceedings in interpleader to be served out of this Province.

It appears to me to be well settled in England that, apart from the authority of a statute or of rules authorized by statute, the Court has no jurisdiction to give leave to effect service abroad, and that since the Orders of 1883, Order XI. is a complete code as to service out of the jurisdiction, superseding previous practice.

It is also settled that, although the rule is as I have stated it to be, while it prevents serving a notice or summons intended to be the foundation of proceedings substituted for an action, it does not prevent notice being given by way of information.

It is upon this ground—that the notice was by way of information only—that the Court of Appeal thought that the decision in *Credits Gerundouse v. Van Weede* (1884), 12 Q. B. D. 171, could be supported: *Re Busfield* (1886), 32 Ch. D. at p. 132.

Numerous English cases which settle the question in the way I have indicated are referred to in the notes to Snow's Annual Practice, 1899, p. 65 *et seq.*, and to the list may be added *Re Rathbone* (1887), 4 Mor. B. C. 270.

The notice in this case is not such a notice as it is held may be served abroad, but a notice intended to be the foundation of proceedings substituted for an action, and by which the Court's jurisdiction over the person served is asserted.

The Consolidated Rules in force in this Province, which have the force of a statute, having been confirmed by an Act of the Legislature, authorize the Court or a Judge to

allow service out of the Province in interpleader proceedings: Con. Rule 162 (3).*

The applicants come within clause (a) of Con. Rule 1103† as persons under liability for a debt for or in respect of which they are or expect to be sued by two or more persons, and therefore are entitled to avail themselves of the provisions of the Rule.

Whatever one may think as to the expediency of a Rule so wide and general in its terms as that part of Con. Rule 162 (3) with which I am dealing, I am not at liberty to disregard its apparently plain provisions by holding that the Master in Chambers had not jurisdiction to allow the service to be made out of Ontario.

It is not necessary for me to consider what may happen on the return of the motion if the appellant does not appear and submit to the jurisdiction of the Court—all I decide is that I ought not at this stage of the proceedings to interfere with the action which the Master in Chambers has taken in refusing to set aside his order for service out of Ontario.

The appeal is dismissed, and the costs of it and of the application to the Master in Chambers will be in the cause to the successful party.

Sarah Elizabeth Langridge appealed from this decision, and her appeal was heard by a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., on the 11th September, 1899.

J. J. Maclaren, Q.C., for the appellant, cited *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A. C. 670; *Credits Gerundeuse v. Van Weede* (1884), 12 Q. B. D. 171; *Weldon v. Gounod* (1885), 15 Q. B. D. 622; *Re Busfield*

* Service out of Ontario of a petition or notice of motion * * in interpleader proceedings may be allowed by the Court or a Judge.

† 1103. Relief by way of interpleader may be granted: (a) Where the person seeking relief * * is under liability for any debt, money, goods or chattels, for or in respect of which he is, or expects to be, sued by two or more persons * * making adverse claim thereto.

(1886), 32 Ch. D. 123; *Re Nathan Newman & Co.* (1887), 35 Ch. D. 1; *Re Jellard* (1888), 39 Ch. D. 424; *Ex p. Brandon* (1886), 54 L. T. N. S. 128; *Patorni v. Campbell* (1843), 12 M. & W. 277.

Snow, for the Confederation Life Association, supported the order.

The judgment of the Court was given at the conclusion of the argument by

ARMOUR, C. J.—Rule 1103a only applies to the case of a person who is or expects to be sued in this Province, and consequently does not apply to the applicants, who neither have been, nor do they expect to be, sued in this Province.

We have no power to interfere with the suits brought against them by the rival claimants in the Courts of the Provinces of Quebec and Manitoba.

The appeal must therefore be allowed with costs here and below and the order of the Master in Chambers discharged.

[Leave to appeal from the decision of the Divisional Court was granted by the Court of Appeal on the 2nd October, 1899.]

STEWART ET AL. V. FERGUSON.

Appeal—Master's Report—Time—Cross-Appeal—Rule 769.

According to the true meaning of Rule 769, each party is precluded from appealing against the report or certificate of a Master unless he serves his notice of appeal within the fourteen days mentioned in the Rule; and notice of appeal given in proper time by one party does not prevent the report from becoming absolute as regards another party.

[October 5, 1899.—*Ferguson, J.*]

AN appeal by the defendant from a report of the Master at Woodstock came on for hearing before FERGUSON J., in Court, on the 21st September, 1899.

The report was dated on the 2nd September, 1899; notice of filing was served on the 5th September, 1899; and the defendant had given notice of appeal in due time.

J. Bicknell, for the plaintiffs, asked to have the hearing of the defendant's appeal adjourned to come on with a cross-appeal by the plaintiffs from the same report, notice of which had been given that day, the 21st September, returnable after seven days.

A. Millar, Q.C., for the defendant, waived the seven days' notice, and agreed to the cross-appeal being heard at once, subject to the objection that the report was absolute as to the plaintiffs by lapse of time: Rule 769.

Bicknell contended that the defendant's notice of appeal, being in time, saved the report from becoming absolute even as to the plaintiffs, so long as the latter brought on their appeal within one month, as required by Rule 771. He asked to have the time for appealing extended, if necessary.

Rule 769.—Every report or certificate of a Master shall be filed, and shall become absolute at the expiration of fourteen days from the date of service of notice of filing

the same, unless notice of appeal is served within that time.

Rule 771.—(1) A notice of appeal from the report or certificate of a Master * * shall be a seven clear days' notice, setting out the grounds of appeal, and shall be returnable within one month from the date of service of notice of filing of the report or certificate, unless otherwise ordered.

The cross-appeal was heard subject to the objection, and judgment was delivered on the 5th October, 1899.

FERGUSON, J.—The appeal was in good time, but it was objected that the cross-appeal was too late. The notice of this cross-appeal was served on the day of the argument. The right to the seven days' notice was waived, but it was contended that, as more than fourteen days had elapsed after service of the notice of the filing of the report and before the service of the notice of the cross-appeal, it, the cross-appeal, could not be entertained. Rule 769 was relied upon by both counsel, and it was said there was not any decision on the precise point. That Rule is as follows:—*Every report or certificate of a Master shall be filed and shall become absolute at the expiration of fourteen days from the date of service of notice of filing the same, unless notice of appeal is served within that time.*

The contention of counsel for the cross-appellants was that, although more than fourteen days had elapsed after the date of service of notice of filing the report and before service of his notice of cross-appeal, yet, inasmuch as there had been in the meantime and during the fourteen days a notice of appeal (the appellant's notice) served, the report had not become absolute, and that the cross-appeal was, therefore, in good time.

I have considered this proposition as well as I have been able, and arrived at the conclusion that the contention should not succeed, and that, according to the true meaning

of the Rule, each party is precluded from appealing from the report or certificate of a Master unless he serves his notice of appeal within the fourteen days.

I am now of the opinion that the cross-appeal should not have been entertained at all, and I need therefore say no more about it.

RONDOT V. MONETARY TIMES PRINTING CO. OF CANADA.

Interpleader—Refusal of Application by Sheriff—Claimant—Appeal—Summary Decision—Question of Fact—Rule 1111—Abandonment of Seizure—Issue—Re-seizure.

Where an application was made by a sheriff for an interpleader order in respect of goods seized by him under an execution against the plaintiff, and claimed by a brother of the plaintiff as purchaser of the goods, the Judge, assuming to act under Rule 1111, decided the question in favour of the claimant, without directing the trial of an issue, and made an order refusing the application, directing the sheriff to withdraw from possession of the goods, ordering the execution creditors to pay the sheriff's costs and possession money and the claimant's costs, and directing that no action should be brought by the claimant against the sheriff in respect of the seizure :—

Held, that the execution creditors had the right to appeal against this order.

The execution creditors did not dispute the claimant's title to the goods by purchase from one to whom they were sold by the plaintiff's assignee for creditors, but contended that the claimant's present professed ownership was a mere sham and a fraud contrived to enable the plaintiff to carry on business independently of the demands of his creditors :—

Held, that the question presented was not one of law, but of fact, and an issue should have been directed.

But, the sheriff having relinquished possession of the goods pending the appeal, it was too late to direct an issue ; and unless the parties could agree upon one, the proper course would be for the execution creditors to seize again.

[September 9, 1899.—*Rose, J.*]

[October 14, 1899.—*Divisional Court.*]

AN appeal by the defendants from an order of one of the local Judges at Sandwich refusing an application by the sheriff of Essex for an interpleader order in respect of goods seized under the defendants' execution against the plaintiff. The order also directed the sheriff to withdraw from the possession of the goods, ordered the execution creditors to pay the sheriff's costs and possession money

and the claimant's costs, and directed that no action should be brought by the claimant against the sheriff for or in respect of the seizure of the goods.

The appeal was heard by ROSE, J., in Chambers, on the 8th September, 1899.

King, Q.C., for the defendants, contended that the local Judge should have directed the trial of an issue, instead of barring the execution creditors, as he had in effect done.

J. H. Moss, for the sheriff.

H. E. Rose, for the claimant, contended that the sheriff having withdrawn from the seizure under the local Judge's order, there could be no interpleader, and also that the local Judge had the right under Rule 1111* to summarily dispose of the matter, and had done so properly.

Judgment was delivered on the following day.

ROSE, J.—I have examined the papers and authorities in this case. If the question is one of law, and the facts are not in dispute, the order is one that the local Judge can make, and I cannot reverse it unless I differ from him as to his conclusion of law.

The facts as they appear are that the plaintiff, the execution debtor for costs, made an assignment for the benefit of creditors, under which his goods passed to his assignee. The assignee sold these goods to one Williamson, who sold them to the brother of the plaintiff, who bought them at the request of the plaintiff, in order that the plaintiff might carry on business and out of the profits of the business have a living, living as closely as he could, and that the brother, the purchaser, who is the claimant, should have any benefit that would accrue after the plaintiff had had his living out of the business.

*1111. Where the question is one of law, and the facts are not in dispute, the Court or a Judge may decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the Court.

These facts appear uncontradicted.

By the assignment, all right, title, and interest in the goods passed out of the plaintiff. The execution creditor, therefore, at that time could not get them. They were as much a stranger's as if the plaintiff had never owned them ; and, unless the evidence points to the plaintiff being the purchaser of the goods for himself for his own benefit, so as to become the owner of them, the execution creditor cannot have them.

There is no law that I know of that prevents a brother, if he chooses to do so, incurring liability or paying out money for the benefit of his brother. In this case the claimant purchased the goods by giving his note, indorsed by his father. I assume that one or other or both were financially responsible; otherwise this purchase or sale would not have been made in that way, or the sale would not have been made to them on their credit. The whole or a portion of the purchase money—I have forgotten which—has been paid, and it was said at bar that a portion of the money had been distributed by the assignee.

The purchaser, the brother, states, fairly and candidly enough, that he knew very little about the business ; that he did all this at the request of his brother in order that the latter might have a livelihood. There is no dispute about these facts, and unless an inference of law can be raised against the claimant, there is nothing upon which to send an interpleader issue down for trial.

I think, therefore, that the learned local Judge had a right to take the matter into his consideration, and that the order was in accordance with the facts, and that his conclusion of law was proper, and that the appeal must be dismissed with costs.

The defendants appealed from the order of ROSE, J., and their appeal was heard by a Divisional Court composed of BOYD, C., and FERGUSON, J., on the 6th October, 1899.

King, Q.C., for the appellants. The facts are in dispute, as the evidence before the local Judge shews, and he

had no power to act under Rule 1111. The local Judge thought the case exactly like *Dominion Savings and Investment Society v. Kilroy* (1888), 15 A. R. 487; but that turned upon the provisions of the Married Women's Property Acts. In this case the sale was a mere sham, as in *Meakin v. Samson* (1878), 28 C. P. 355.

Riddell, Q. C., for the claimant. The interpleader application was entirely for the sheriff's protection: *Scarlett v. Hanson* (1883), 12 Q. B. D. 213; Warde's Practice of Interpleader, p. 15; Cababé on Interpleader, 2nd ed., p. 41. An appeal by the execution creditors does not lie: *Bain v. Funk* (1869), 61 Pa. St. 185. The sheriff opposes this appeal, and has gone out of possession. The execution creditors are not barred as against the claimant; they can still sue him. No right was barred by the order, except the right of the claimant, who does not complain. See *Ogden v. Craig* (1884), 10 P. R. 378; Archbold's Practice, 14th ed., pp. 1366-1372. The order is right under Rule 1111. See *Re Tarn*, [1893] 2 Ch. 280; *Cooney v. Sheppard* (1895), 23 A. R. 4; *Eveleigh v. Salisbury* (1836), 5 Dowl. 369.

C. A. Moss, for the sheriff. I oppose the appeal. The sheriff has gone out of possession of the goods. He wants protection if any change is made in the order.

King, in reply. Interpleader matters are not interfered with by the Judicature Act: *Beaty v. Bryce* (1882), 9 P. R. at p. 322. For forms of order in interpleader, see Warde's Practice of Interpleader, p. 37. The consent to try summarily must appear on the face of the order: *Harrison v. Wright* (1845), 13 M. & W. 816, referred to in *Bank of Hamilton v. Durrell* (1888), 15 A. R. at pp. 513, 515. An issue should have been directed, and the execution creditors, being prejudiced by its refusal, have the right to appeal: Cababé on Interpleader, 2nd ed., pp. 64, 65, 68; *Coulson v. Spiers* (1883), 9 P. R. 491. An appellate Court may review a judgment as to inferences from evidence: *Russell v. Lefrancois* (1883), 8 S. C. R. 335. See also *Allen v. Evans* (1833), 3 L. J. N. S. Ex. 53; *McKay v. McKay* (1851), 1 C. L. Chamb. 165.

Judgment was delivered on the 14th October, 1899.

BOYD, C.—The local Judge refused the interpleader order, at the instance of the sheriff, on the ground that the position of the claimant could not be distinguished from that of the claimant in *Dominion Savings and Investment Society v. Kilroy* (1888), 15 A. R. 487. He appears to have proceeded under Rule 1111, by which the question may be decided by the Judge, without directing the trial of an issue, where the contention is one of law and the facts are not in dispute. His dismissal of the application for interpleader, imposing costs, etc., on the execution creditors, was affirmed by Mr. Justice Rose in an oral judgment.

Before us it is made to appear very clearly that, while certain facts as to the manner of holding and title on the part of the claimant are not in dispute, the proper deduction and inference from those facts is the all important matter. Thus the question presented is not one of law, but of fact, the solution of which should not be taken away from the proper forum and disposed of in a summary way upon written or affidavit evidence.

It may be that, the sheriff having now, it is said, relinquished possession of the goods pending the appeal, it is too late to preserve in specie or to order a sale of the property seized, so that the granting of an issue would be inoperative; but, if that be so, the execution creditors are still entitled to be relieved from that term of the order which orders them to pay costs to the claimant.

It was stated during the argument that the execution creditors do not seek to prejudice the position of the sheriff under the order in appeal.

It was strenuously argued that no appeal lay from an order which was made in interpleader proceedings initiated by the sheriff entirely for his benefit—but the better view, I think, is that, the proceedings having been begun by the sheriff, and both parties brought before the Court, each becomes an actor, and is entitled to have the application disposed of according to law. Now, there has

not been a proper exercise of jurisdiction in this case, because of the error in dealing with the application as if it fell under Rule 1111. The execution creditors have been prejudiced by this, and should be allowed to have the miscarriage rectified so far as the changed circumstances permit.

Besides, there appears to be no doubt that an appeal lies in interpleader, under Rules 45, 767, and 777: see *Clench v. Dooley* (1886), 56 L. T. N. S. 122.

If the parties now agree to the framing of an issue, that would be the proper course to determine the controversy. If not, it will still be open for the execution creditors to seize again, the former order being vacated so far as it may interfere with this being done.

Costs will be reserved if the parties proceed to an issue: otherwise no costs of the Courts below or of this appeal, and a refund of the costs ordered to be paid by the execution creditors to the claimant.

FERGUSON, J.—This is an appeal from an order made by Mr. Justice Rose affirming an order made by the local Judge at Sandwich.

The application to the local Judge was by the sheriff, who had, under an execution in which the defendants, the Monetary Times Company, were execution creditors (for costs), and the plaintiff, Rondot, was the execution debtor, seized a store of goods situated in Amherstburg, the goods having been claimed by a brother of the plaintiff, for an interpleader order for the trial of an issue in respect to the ownership of the goods. So far as it appears, there was nothing peculiar in the sheriff's application. It was the ordinary application made by the sheriff in such cases.

The local Judge made an order refusing the application for an interpleader order, directing the sheriff to withdraw from the possession of the goods, and ordering the execution creditors to pay his (the sheriff's) costs, including possession money, as well as the claimant's costs, and directing that no action be brought by the claimant

against the sheriff for or in respect of the seizure of the goods.

The appeal is by the execution creditors. The sheriff is content and does not appeal. It was objected that the execution creditors have no right of appeal from the order, the only one having such right being the sheriff. In support of this objection a number of cases, some of them being cases in foreign Courts, were cited. I think, however, that the case *Coulson v. Spiers* (1883), 9 P. R. 491, shews that such right of appeal does not belong solely to the sheriff, and that, unless a change has taken place in the law since that case was decided, in 1883—and I have not discovered such a change—there is the right of appeal in this appellant: see also Rules 45 and 767.

From all that has been made to appear, one does not see whether the learned local Judge proceeded under the provisions of Rule 1110 or those of 1111. There does not appear to have been any consent of the contending parties before him, and one can scarcely think that, having regard to the value of the subject-matter in dispute (the store of goods), the learned Judge would proceed to dispose of the merits of the claim at the request of one of the claimants. As, however, he says in his judgment (at which, whether rightly or wrongly, I have taken occasion to look) that the facts were not in dispute, I may assume that he proceeded under the provisions of Rule 1111, thinking that he was determining a matter of law only.

Certain facts—those mentioned and referred to in the judgment of Mr. Justice Rose—do not seem to have been disputed: that is, the apparent facts of the assignment by the debtor and subsequent conveyances of the goods, etc., etc. But what the execution creditors contend, and desire an opportunity of trying, is that the present professed ownership of the goods by the claimant, the brother of the execution debtor, is a mere sham, and a fraud contrived to enable the execution debtor to carry on business independently of the demands of his creditors, and that the goods are really the goods of the debtor and

liable to be seized and sold to satisfy their (the execution creditors') claim. This seems an important matter, clearly outside of all the facts admitted or not in dispute, and it presents, as I cannot but think, a fair question for trial and a fit subject to be disposed of upon the trial of an issue.

On the whole case, so far as it appears, I cannot but think that the order made by the learned local Judge was a miscarriage, and that the execution creditors should be relieved from the effect of it, so far at least as this can now be done, and the question arises as to what, in the (no doubt) changed circumstances, is the proper relief. In *Coulson v. Spiers* (1883), 9 P. R. 491, an issue was directed, but there the proceeds of the sale of the goods seemed to be yet in hand. Here the goods that were seized may by this time have largely disappeared, and none of them is in the hands of the sheriff or under his control, and it was agreed upon the argument that the position of the sheriff as to protection and otherwise should not be disturbed, or, if the order were varied, the sheriff should still be protected to the same extent as at present.

If, however, the parties can agree in framing an issue and as to the goods to be the subject of the trial of it, possibly the controversy can be ended in this way. I do not see that an issue can now be imposed upon them, because there is no subject-matter in hand.

If the parties cannot so agree, the execution creditors must be left at liberty to seize again, and no provision of the order made by the local Judge should be allowed to stand in the way of their so doing. Owing to the agreement on the argument, I do not see how we can relieve the execution creditors from the payment of the sheriff's costs and possession money ; but they should be relieved from paying the claimant's costs.

In case either of the trial of an agreed upon issue or of a second seizure and an interpleader, there should be leave to the execution creditors to apply to be recouped the costs and possession money ; and in either case the costs of this application and of both appeals are reserved ; otherwise no costs either of the application or appeals.

TAYLOR ET AL. V. ROBINSON ET AL.

Solicitor—Charging Order—Recovery of Land—Rule 1129—Execution—Priorities.

An action having been begun on the 3rd June, 1896, judgment was obtained therein on the 27th October, 1896, declaring the plaintiffs' right to an interest in certain lands. An execution against the plaintiffs' lands was placed in the sheriff's hands on the 29th April, 1897. On the 1st September, 1897, Con. Rule 1129 was passed, by which the Court was enabled to order that lands recovered by the exertions of a solicitor should be charged for his benefit:—

Held, that the execution bound the plaintiffs' interest in the lands from the 29th April, 1897, and the subsequent enactment of the Rule did not operate to divest this charge, or to postpone the claim of the execution creditors to the subsequently acquired equity of the solicitors in respect of their costs of the action.

[October 21, 1899.—*Boyd, C.*]

AN application by the defendant George Robinson for payment out to him and other persons entitled of a fund in Court. The facts are stated in the judgment.

The application was heard by *BOYD, C.*, in Chambers, on the 20th October, 1899.

Atkinson, Q.C., for the applicant and for the sheriff of Kent (representing execution creditors).

A. J. Boyd, for the official guardian.

H. W. Mickle, for the plaintiffs and their solicitors, asserting a lien on the fund in priority to execution creditors.

Judgment was delivered on the following day.

BOYD, C.—On the 1st September, 1897, the Rule was passed by which the Court was enabled to order that *land* recovered by the exertions of a solicitor should be charged for his benefit: Con. Rule 1129. Prior to this, no such power existed as to land. That date appears to be decisive of the present application, where the solicitors seek priority as to the fund in Court over an execution creditor of their clients. This action was begun by the solicitor for the plaintiffs on the 3rd June, 1896, and judgment was obtained declaring the plaintiffs' right to the

lands on the 27th October, 1896, but directing accounts, etc. The execution against the plaintiffs for the recovery of the official guardian's costs in another action was issued against their lands and placed in the sheriff's hands on the 29th April, 1897, at which time the accounts were being taken in the Master's office.

After a year had elapsed, and after a sale could be had under the execution, the Court in this action gave judgment on further directions on the 8th November, 1898, directing a sale of *all* the land—the plaintiffs having only a fractional interest therein. A motion being made to restrain sale under execution, that was ordered, on account of the larger sale to be had in this action, after which the rights of all parties to the proceeds were to be adjusted.

On this state of facts it is plain, I think, that the execution bound the plaintiffs' interest in the lands from the 29th April, 1897, at a time when no charge on the lands was possible in favour of the solicitors. The subsequent enactment of the Consolidated Rule did not operate to divest this charge or to postpone the prior claim of the execution creditors to the subsequently acquired equity of the solicitors to the discretionary intervention of the Court. The charge under the execution must precede the solicitors' lien, which was of subsequent origin: see *Goodfellow v. Gray*, [1899] 2 Q. B. 498.

After payment to the plaintiffs and of the other charges for commission and disbursements, which will leave a balance of \$758 in Court, the next payment in order is to the first execution creditor who seized, and whose levy was intercepted by the Court, but without prejudice to his rights. That right of privilege for full payment is secured by sec. 26 of the Creditors' Relief Act, R. S. O. ch. 78.

It is agreed that other executions against lands came in before the 1st September, 1897, and as to these there must be ratable distribution of the balance pursuant to the said Act, though not necessarily by the sheriff. It may be carried out either by the Clerk in Chambers or the Master at Chatham, on the usual notices to creditors.

BARRIE PUBLIC SCHOOL BOARD ET AL. V. TOWN OF BARRIE.

Parties—Joining Plaintiffs without Authority—Motion by Defendants to Strike Out—Solicitor—Retainer—Sufficiency of—Corporate Seal—Costs.

Solicitors who began an action in the name of a public school board and an individual as plaintiffs were retained for the board by a special committee appointed by resolution of the board, not under the corporate seal; the purposes of the appointment, as stated on the face of the resolution, embraced the commencement of any action respecting the matters referred to and the employment of counsel, the subject of the action being one of such matters:—

Held, that this was not proper authority from the school board to the solicitors to bring the action, and the defendants had the right to have the name of the board as plaintiffs struck out.

Town of Barrie v. Weaymouth (1892), 15 P. R. 95, followed.

The solicitors having acted in good faith and under the belief that their retainer was sufficient, no costs were awarded.

[November 8, 1899.—*Ferguson, J.*]

THIS action was brought in the names of the Barrie Public School Board and Alexander Wiggins as plaintiffs, against the corporation of the town of Barrie, defendants.

Upon the application of the defendants (upon notice to the solicitors for the plaintiffs and to the board) an order was made by the senior local Judge at Barrie striking out the name of the school board as a plaintiff, upon the ground that the solicitors who issued the writ of summons were not authorized to bring or prosecute an action in the name of the board.

From this order the plaintiffs appealed, and the appeal was heard by FERGUSON, J., in Chambers, on the 6th November, 1899.

A. E. H. Creswicke, for the appellants, referred to *R. S. O.* ch. 292, secs. 62, 77; *The Queen v. Justices of Cumberland* (1847), 17 L. J. Q. B. 102; *Clarke v. Union Fire Ins. Co.* (1883), 10 P. R. at p. 342; *Dillon on Municipal Corporations*, 7th ed., sec. 450; *Brice's Doctrine of Ultra Vires*, 3rd ed., p. 542; *Arnold v. Mayor, etc., of Poole* (1842), 4 M. & G. 860; *Nevill v. Township of Ross* (1872), 22 C. P. 487; *Perry v. Corporation of Ottawa* (1864), 23

U. C. R. 391 ; *Ellis v. Midland R. W. Co.* (1882), 7 A. R. 464 ; Municipal Act, R. S. O. ch. 223, sec. 325 ; *Thames Haven Dock and R. W. Co. v. Hall* (1843), 5 M. & G. 274, 288, 289, 290 ; *Scribner v. Parcells* (1890), 20 O. R. 554.

Strathy, Q.C., for the defendants, cited *Town of Barrie v. Weaymouth* (1892), 15 P. R. 95 ; Am. & Eng. Encyc. of Law, 2nd. ed., vol. 7, pp. 764-5 ; Brice's Doctrine of Ultra Vires, 3rd ed., pp. 567, 684, 620 ; *Mayor, etc., of Oxford v. Crow*, [1893] 3 Ch. 535 ; Pollock on Contracts, 6th ed., pp. 143, 149, 150 ; *Quin v. School Trustees* (1850), 7 U. C. R. 130 ; *Marshall v. School Trustees of Kitley* (1855), 4 C. P. 373.

Judgment was delivered on the 8th November, 1899.

FERGUSON, J.—This is an appeal from an order made by the local Judge at Barrie striking out the name of the plaintiffs the Barrie Public School Board.

The order was made on the application of the defendants, and on the ground that the action was not properly authorized by the school board, nor had the plaintiffs' solicitors been properly empowered by the school board to commence or prosecute the action. On the argument before me it was said that the ground, shortly stated, was that there had been no retainer, or employment, or authorization of the solicitors acting for the plaintiffs, under the corporate seal of the school board.

The action was commenced on the 7th day of October, 1899. Differences having arisen between the school board and the town of Barrie regarding some important financial matters, the school board by resolution appointed a special committee to investigate the matters in dispute, and on the 1st day of August, 1899, a report of this special committee was presented and read at a special meeting of the school board, and was then, by resolution of the board, adopted.

This report contained a clause in these words: "We would therefore recommend that Messrs. Hewson and

Creswicke be instructed to insist upon a settlement of these matters, amicably if possible." And on the 3rd day of August, 1899, a letter was written by Mr. Marr, the secretary of the school board, to Messrs. Hewson and Creswicke, advising them of the adoption of the report of the special committee containing this clause.

On the 11th day of September, 1899, a resolution was passed by the school board reappointing a special committee to have charge of the matters in dispute and to endeavour to enforce a settlement of the same, and stating that such committee should have power to commence any action and employ any counsel in the name and on behalf of the board that they might consider necessary for that purpose on and after the 27th day of the then month of September; provided the corporation of the town of Barrie did not in the meantime make satisfactory arrangements with the committee for the proper adjustment of the matters in dispute.

On the 30th day of October, 1899, a letter was sent by this committee to Messrs. Hewson and Creswicke, who are the solicitors now acting for the plaintiffs, written expressly pursuant to that resolution of the school board (setting forth the resolution above referred to) and saying: "You are instructed to proceed with the action already commenced in the name of the Barrie Public School Board jointly with Alexander Wiggins as against the corporation of the town of Barrie, pursuant to instructions given you before the commencement of the said action by the said committee under the above resolution."

Neither of the resolutions of the school board was under the corporate seal of the board.

The retainer and employment of the solicitors acting for the plaintiffs the school board thus seems to have been by a special committee appointed by the board, by resolution not under the corporate seal of the board, the purposes of the appointment, as stated on the face of the resolution, embracing the commencement of any action respecting the matters referred to and the employment of counsel, the subject of the present action being one of such matters.

The case *Town of Barrie v. Weaymouth* (1892), 15 P. R. 95, shews, as I think, that if there was not proper authority from the school board to bring this action, the defendants have the right to have the name of that board as plaintiffs struck out. The defendants obtained an order therefor and entered a conditional appearance, the condition or matter mentioned therein saving their present contention, and I do not see that the lapse of time since the defendants are shewn to have had knowledge of the facts is so great as to constitute ground for the contention made against them as to laches on their part. I think the defendants have not been shewn to have waived any of the rights that they had at the beginning.

There does not appear to have been any document under the corporate seal of the plaintiffs the Barrie Public School Board, retaining, employing, or authorizing the solicitors to bring or prosecute this action, or any such document retaining or employing these solicitors generally, nor does it appear that there was any document under the seal of the Barrie Public School Board appointing any committee or agent to retain or employ these solicitors to bring or prosecute this action.

A very large number of cases and books of authority were referred to upon the argument of the appeal as having a bearing upon the question to be decided. These I have perused and examined throughout without having been able to arrive at the opinion that they support the contention of the appellant. However interesting it might be so to do, I do not see that it would serve any useful purpose to write an analysis of these here. After the best consideration I have been able to bestow upon the case and the arguments, I am of the opinion that the order appealed from should be affirmed. I may add that I am also of the opinion that the solicitors who brought the action acted in perfectly good faith and under the belief that their retainer was sufficient.

Appeal dismissed. No costs.

RE McBRADY AND O'CONNOR, SOLICITORS.

Solicitor—Bill of Costs—Delivery—Taxation—R. S. O. ch. 174—Employment—Transaction of Business—Foreign Estate—Scope of Business—Agreement—Benefit to Solicitor—Public Policy—Inherent Jurisdiction.

The jurisdiction granted by the provisions of the Act respecting solicitors, R. S. O. ch. 174, to order the delivery of a bill of fees, charges, or disbursements for business done by a solicitor as such, is distinct from and independent of the jurisdiction thereby granted to order the same to be taxed; and there is power to order delivery of a bill whether it has been paid or not, and whether or not it is one which the Court would have power to refer to taxation.

Duffett v. McEvoy (1885), 10 App. Cas. 300, *Re West*, [1892] 2 Q. B. 102, and *Re Baylis*, [1896] 2 Ch. 107, followed.

Where the employment of a solicitor is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, the Court will exercise its summary jurisdiction over him.

Re Aitkin (1820), 4 B. & Ald. 47, followed.

Solicitors in Ontario being employed to transact business in relation to a claim of their client upon an estate in England:—

Held, that they were employed because they were solicitors, and the business was within the scope of the business of solicitors, and it made no difference that the estate was in England, for they were employed in Ontario and the business was transacted there.

Held, also, that an agreement that the solicitors should retain \$500 as commission for business done and to be done could not stand in the way of the taxation of the solicitors' bill, for such an agreement is against the policy of the law, and solicitors cannot enter into any stipulation on the terms of getting a better benefit than they would get by the costs which they are entitled to charge. The agreement was void as being for business done and to be done, and upon the taxation it should be disregarded.

Held, lastly, that the Act respecting solicitors did not deprive the Court of its inherent jurisdiction over them as officers of the Court.

[May 2 and June 13, 1899.—*The Master in Chambers.*]

[June 5, 1899.—*Rose, J.*]

[October 2, 1899.—*Meredith, C.J.*]

[November 10, 1899.—*Divisional Court.*]

AN application by Oliver Peake for an order under the Solicitors Act for the delivery of a bill of costs by the solicitors to the applicant, under the circumstances stated in the judgment of the Master in Chambers, before whom the application was heard on the 28th April, 1899.

F. S. Mearns, for the client.

L. V. McBrady, for the solicitors.

Judgment was delivered on the 2nd May, 1899.

THE MASTER IN CHAMBERS—There is no dispute as to the retainer, nor that the solicitors did, at the request of the client, perform certain services for which they are entitled to be paid. There is a dispute as to when the retainer was given and as to the amount of remuneration of the solicitors. This latter question is alleged by the solicitors to have been settled by the agreement of the client.

The facts are that Oliver Peake, the client in question, becoming entitled to a legacy under his father's will, employed Messrs. McBrady & O'Connor, the solicitors, to apply to the executors in England, where the estate was, for the payment of his legacy. This they did and in a short time received £319 15s. 4d. or \$1,547.26 on account of the legacy. At the request of the client they deposited the whole of this sum to their own credit in their bank, and at frequent intervals paid the client certain portions of it as he called for same. It appears from the evidence that the client was addicted to drink, so much so that his wife was obliged to call upon the solicitors and request them to pay him no more money. The client when calling upon the solicitors was, their clerk states in her examination, generally under the influence of liquor. In addition to this habit, it seems to me that both the client and his wife are illiterate people. However that may be, there is no doubt that upon their examinations they shewed that their memories were very defective in some important respects, while in other respects they stated matters as facts which were denied positively by the solicitors and their clerk.

It appears that on the 22nd July, 1898, the client and his wife called upon the solicitors for the purpose of settling the account. They had received up to that date in various payments \$382.50, leaving a balance due them of \$1,164.76. Mr. McBrady went over the amounts paid from time to time to the client, and also the amount due

the client under his father's will, and no doubt mentioned generally the work and services performed by his firm in the collection of the legacy; but I find that there was no bill of costs shewn the client or explained to him or his wife. On the other hand, the solicitor stated that he thought ten per cent. on the whole amount of the legacy which the client would be entitled to receive from his father's estate, which they supposed would be in the neighbourhood of \$10,000, would be a fair charge. This ten per cent. would make the solicitors' charge equal \$1,000. This sum was not agreed upon, and Mr. McBrady leaving his client went out of the room to speak to his partner, Mr. O'Connor, about the matter, and returning stated that they would take five per cent. on the amount of \$10,000, and that would be a fair and reasonable charge under the circumstances. What the client and his wife said upon hearing this demand is not clear, but the solicitor and his clerk say that they were satisfied, while the client and his wife deny that. However, the solicitor drew up a statement on his firm's letter paper as follows:

"Toronto, July 22nd, 1898.

Proceeds of draft for £319 15s. 4d.....	\$1547 26
Received in several payments from	
McBrady & O'Connor	\$382 50
Received on this date the sum of two	
hundred and fifty dollars.....	250 00
The fees of McBrady & O'Connor and	
their disbursements in connection	
with the personal estate and the	
work they have already done, or	
for receiving statements, paying	
over money, etc., are hereby fixed	
and allowed at.....	500 00
To balance in the hands of Messrs.	
McBrady & O'Connor.....	414 76
	————— \$1547 26
By balance.....	\$414 76

The above is a true and correct statement and is satisfactory.

McBRADY & O'CONNOR.

Witness, M. McGLUE.

OLIVER PEAKE.

MARY PEAKE."

This memorandum was, no doubt, read over and explained to the client before he and his wife signed it, but in her examination Mrs. Peake says :

"198. Q. Is that the document you signed ? A. I don't know because I didn't read it ; I just signed my name when you asked me to sign it, and I didn't look at it, didn't look what was written at the top or anything about it ; I signed my name and didn't know anything more about it, and I didn't know what I was doing.

199. Q. Are you very often taken that way that you don't know what you are doing ? A. Not very often.

200. Q. This is the only time you remember ? A. Yes, because your charge would knock anybody out of their senses."

And the client in his examination says :

"134. Q. I read that over to you didn't I ? A. You had me muddled up.

136. Q. And after it was read over to you, and after the explanation that has been made, you signed it, didn't you ? A. Yes, I signed that."

It is stated that the \$414.76 balance left after the \$250 was paid on the 22nd July, 1898, and the \$500 charge deducted, was to remain in the solicitors' hands for investment, but three days afterwards the client returned for it and obtained a cheque payable to his order for this sum underwritten " (in full balance of all moneys in our hands, *re* Peake estate)." This cheque was indorsed by the client, and also a receipt given by him on the same day, as follows :

"Toronto, July 25th, 1898.

Received from McBrady & O'Connor the sum of four hundred and fourteen and 76/100 dollars, in full balance of all moneys in their hands *re* Thomas Peake estate.

OLIVER PEAKE."

After receiving this money the client went to England, and immediately upon arriving there he instructed solicitors there to obtain a bill of costs from the solicitors herein. This was refused, and this application is made in consequence.

The evidence upon the application has been lengthy, unnecessarily so, I think.

In cases such as *In re Baylis*, [1896] 2 Ch. 107, *In re West*, [1892] 2 Q. B. 102, and many others, it is laid down that a solicitor retaining moneys in his hands belonging to his client, even under agreement, is not relieved from the delivery of a bill of his costs. In the present case there is no doubt in my mind that the client is entitled to a bill, and I order that a bill be delivered to him within one week. Costs reserved to be disposed of by the taxing officer in case the bill is taxed.

The solicitors appealed from the Master's order to a Judge in Chambers, and their appeal was dismissed by ROSE, J., in Chambers, on the 5th June, 1899.

On the 13th June, 1899, an order was made by the Master in Chambers, upon the application of Oliver Peake, referring to taxation a bill of fees, charges, and disbursements which had been delivered by the solicitors to Peake on the 8th June, 1899, and ordering that the bill should be taxed without reference to that portion of it which referred to the agreement or agreements made between Peake and the solicitors, and directing that the taxing officer should take an account of all sums of money received by the solicitors for or on account of Peake.

The solicitors appealed from this order also, and their appeal was dismissed by MEREDITH, C. J., in Chambers, on the 2nd October, 1899.

The solicitors then appealed from the several orders made by ROSE, J., and MEREDITH, C. J., to a Divisional Court, and their appeal was heard by ARMOUR, C. J., and FALCONBRIDGE, J., on the 6th November, 1899.

W. H. Blake, for the appellants. They did not act as solicitors in this matter, but as financial agents or men of business: *Ostrom v. Benjamin* (1893), 20 A. R. 336. An Ontario solicitor could not as such advise as to the position of his client under an English will: *O'Connor v. Gemmill* (1899), 26 A. R. 27.

F. S. Mearns, for Peake. The Solicitors Act has been amended since *Ostrom v. Benjamin* (1893), 20 A. R. 336, by the insertion in what is now sec. 35 of the words "whether any such business was done in a Court or not:" see 60 Vict. ch. 15, Sched. A. (33.) The bill rendered by the solicitors shews that the work done was solicitors' work. If part of the bill is taxable, the whole is taxable: *Re Jones* (1872), L. R. 13 Eq. 336; *Winter v. Payne* (1796), 6 T. R. 645; *Smith v. Taylor* (1831), 7 Bing. 259. The character in which solicitors act is presumed to be that of solicitors: *Re O'Donohoe* (1868), 4 P. R. 266; *Re Eccles* (1859), 6 U. C. L. J. 59; *Re Osborne* (1858), 25 Beav. 353; *Re Strother* (1857), 3 K. & J. 518; *Re Sudlow* (1849), 11 Beav. 400; *Re Aitkin* (1820), 4 B. & Ald. 47; and cases collected in *O'Connor v. Gemmill*. As to the agreement, the cases referred to by the Master in Chambers are conclusive. The evidence shews that the client was not satisfied.

Blake, in reply. The amendment of sec. 35 does not affect the question. Section 34 is the determining section as to the character of the bill.

On the 10th November, 1899, the judgment of the Court was delivered by

ARMOUR, C. J.—The provisions of the Act respecting solicitors, R. S. O. ch. 174, for the ordering delivery of a bill of "fees, charges, or disbursements for business done by a solicitor as such," and for ordering the same to be taxed,* are similar in effect to the Imperial Act 6 &

*R. S. O. ch. 174, sec. 34.—No action shall be brought for the recovery of fees, charges or disbursements, for business done by a solicitor as such, until one month after a bill thereof, subscribed with the proper

7 Vict. ch. 73, sec. 37, and the jurisdiction thereby granted to order the delivery of such a bill is distinct from and independent of the jurisdiction thereby granted to order the same to be taxed, and this is pointed out by the following cases: *Duffett v. McEvoy* (1885), 10 App. Cas. 300; *Re West*, [1892] 2 Q. B. 102; and *Re Baylis*, [1896] 2 Ch. 107: in which latter case Chitty, J., after referring to *Duffett v. McEvoy*, says (p. 112): "The result of that case, which I readily follow, is, that there is power to order the delivery of a bill whether or not it has been paid—to use the language of the head-note—or whether or not it is one which the Court would have jurisdiction to refer to taxation."

The order of the Master, therefore, for the delivery of a bill was right, as was also the order of my brother Rose dismissing the appeal from that order; and the appeal to us from his order must, therefore, be dismissed with costs here and below.

In *Re Aitkin* (1820), 4 B. & Ald. 47, Abbott, C. J., said, in dealing with the question whether an attorney employed by an administrator to collect and get in the effects due to such administrator, although he had never been employed by him in prosecuting or defending any cause or suit or other proceeding in any Court of law or equity, was subject to the jurisdiction of the Court: "Now the rule by which the Court is to be governed in exercising this summary jurisdiction over its officers seems to me to be this; where an attorney is employed in a matter wholly

hand of such solicitor * * has been delivered to the party to be charged therewith * * .

35. Upon the application of the party chargeable by such bill within the month the High Court or a Judge thereof, or a Judge of a County Court, shall, without money being brought into Court, refer the bill and the demand thereon to be taxed by the proper officer of any of the Courts in the county in which any of the business charged for in the bill was done, whether any of such business was done in a Court or not * * .

42. Where no bill has been delivered * * and where the bill if delivered * * might have been referred as aforesaid, any such Court or Judge may order the delivery of a bill * * .

unconnected with his professional character, the Court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, then the Court will exercise this jurisdiction."

The facts in this case are not so different from the facts in *Re Aitkin* as to afford any ground for not applying to it the principle of that case.

There can be no doubt that the solicitors in this case were employed because they were solicitors, and I have no doubt that they considered themselves to have been so employed until it became to their interest to try to assume a different attitude; and the business they were employed about was within the scope of the business of solicitors.

And it can make no difference that the business they were employed to transact had relation to a claim of their client upon an estate in England, for they were employed here, and the business was transacted here: *Strange v. Brennan* (1846), 15 Sim. 346; *O'Connor v. Gemmill* (1899), 26 A. R. 27.

It is also quite clear that the agreement—if such it can be called—that the solicitors should retain the sum of \$500 as commission for business done and to be done, cannot stand in the way of the taxation of the bill so directed to be delivered by them; for such an agreement is against the policy of the law, and solicitors cannot enter into any stipulation on the terms of getting a better benefit than they would get by the costs which, according to the rules of law, they are entitled to charge: *Pince v. Beattie* (1863), 32 L. J. N. S. Ch. 734.

The so-called agreement was void as being for business done and to be done, and the learned Master rightly ordered that upon taxation of the said bill the said so-called agreement should be disregarded: *Re Newman* (1861), 30 Beav. 196; *Re Cawley* (1870), 18 W. R. 1125; *Re Baylis*, [1896] 2 Ch. 107.

The order of the learned Master referring the said bill for taxation was right, and the order of the learned Chief Justice dismissing the appeal therefrom was right; and this appeal must be dismissed with costs here and below.

It is not to be forgotten that the Act respecting solicitors did not deprive the Court of its inherent jurisdiction over solicitors as officers of the Court, but that jurisdiction is expressly preserved by sec. 56 of that Act, and under it an order may be made for the taxation of a bill, although not in terms of that Act: *Storer v. Johnson* (1890), 15 App. Cas. 203.

MCCUAIG V. CONMEE ET AL.

Interim Injunction—Motion to Dissolve.

Where an interim injunction has been granted until a day certain, and a motion to continue it must be made if it is desired to extend it beyond such day, no motion to dissolve is necessary, except where it is sought to get rid of it in the meantime.

[December 16, 1899.—*Rose, J.*]

A MOTION by the plaintiff to continue an interim injunction and a cross-motion by the defendant Conmee to dissolve it. The facts are stated in the judgment.

The motions were heard by ROSE, J., in the Weekly Court on the 14th December, 1899.

J. H. Moss, for the plaintiff.

Rowell, for the defendant Conmee.

Corley, for the defendants the Rat Portage Lumber Company.

Judgment was delivered on the 16th December, 1899.

ROSE, J.—I do not see how, on any ground, I can continue the injunction granted herein.

If the plaintiff is entitled to receive from the Rat Portage Lumber Company the price of the lumber in

question, it will be no answer to his claim that the company has chosen to pay Conmee. The motion to continue must, therefore, be refused with costs.

As to the motion to dissolve the injunction, I think it was unnecessary. The observations of Vice-Chancellor Malins in *Bolton v. London School Board* (1878), 7 Ch. D. at p. 771, so cover the ground that I venture to quote them at length: "Now, I have before me two motions, the first to restrain the School Board from proceeding to do that which I think they are clearly entitled to do—to pull down and demolish the houses—that motion entirely fails, and must be dismissed with costs. But then the School Board seem to have tried whether they could put themselves in the wrong, and I having granted an order that they should not pull down until after Thursday, the order therefore coming to an end unless renewed this day, they think it necessary to give a notice of motion to dissolve this day that which the day itself would dissolve. The excuse made for it was, that it was until after the 28th or further order, and the notice served on the School Board does seem to contain those words; but the order itself being served contained no such words, and even if it had I am clearly of opinion that the intimation given me by the Registrar is right, that when an interim order is made to extend over a certain day or until further order, it does not mean that it is to go on after that day or until further order, but that it is to stop earlier if the Court shall so order—'until that day or further order,' meaning at an earlier date. Therefore the notice of motion to dissolve this order, which would dissolve itself if not continued, was wholly unnecessary, and that also must be dismissed with costs. The result, therefore, is, that I dismiss both motions with costs, which I think is the fate they both richly deserve."

But it is said that this motion to dissolve was on the ground that the plaintiff in obtaining the order had in breach of good faith suppressed certain facts which the Judge ought to have had before him, and which, if he had

had them before him, would have prevented the granting of the injunction, and it is said that that distinguishes this case from the case to which I have referred, and reference is made to the observation of North, J., in *Wimbledon Local Board v. Croydon Rural Sanitary Authority* (1886), 32 Ch. D. at p. 424, where that learned Judge said : " It appears to me in the first place that the Judge had not as full information as he ought to have had with respect to the matter at the time at which the *ex parte* motion was made, and therefore the defendants were quite justified in coming here and saying that the order was one which ought not to have been made." But it is quite clear that this ground could have been taken in opposition to the motion to continue. The law is collected by Wilson, C.J., in *Hynes v. Fisher* (1883), 4 O. R. pp. 67-69. Therefore, in accordance with the practice, it would have been open to the defendant here to have shewn for cause to the motion to continue that the order had been granted upon a statement of the facts which was unfair, there having been a *suppressio veri*. That case also shews that it was not bad practice to give notice of motion to dissolve, but I think the better practice has been followed of late, viz., to urge such a ground in shewing cause, and not to make a substantive motion to dissolve, and in my opinion there should not be a motion to dissolve an injunction which is granted until a day certain and requires a motion to continue in order to extend it beyond such day. The only case in which, as at present advised, I think that a motion to dissolve would be proper would be where it desired to get rid of the interim order before the day named in the order.

In order that there may be a settled practice, I have conferred with the Chancellor and the Chief Justice of the Queen's Bench and the Chief Justice of the Common Pleas, and am permitted to say that they concur in the opinion I have above expressed as to the practice to be followed.

As to the costs, while I think the motion to dissolve was unnecessary, having perused the material, I do not

think it was without foundation. I think the plaintiff should have brought to the notice of the learned Judge the prior proceedings against King. I have not found it necessary to come to any decided conclusion as to whether this was done in breach of good faith or inadvertently, but I think the fair order under the circumstances will be to make no order on the motion to dissolve save that each party pay his own costs. This will not apply to the Rat Portage Lumber Company, which has been drawn into the litigation. It must have its costs of shewing cause to the motion to continue, and any additional costs, if any, that it has incurred from appearing upon the motion to dissolve.

STEVENSON V. STEVENSON.

Alimony—Costs—Interim Order—Disbursements—Undertaking.

Notwithstanding the language of Rule 1144—"only the amount of the cash disbursements actually and properly made by the plaintiff's solicitor"—an order may be made in an action for alimony for payment by the defendant to the plaintiff's solicitor of a sum to cover prospective witness fees, upon the undertaking of the solicitor to account for all sums not actually and properly disbursed.

[November 28, 1899.—*Boyd, C.*]

AN appeal by the defendant from an order of the local Master at Sarnia, in an action for alimony, requiring the defendant to pay interim alimony to the plaintiff, and interim disbursements, including prospective witness fees, to the plaintiff's solicitor.

Rule 1144:—An application for costs, in an alimony action, shall not be made until the time for delivering the defence has expired, and costs shall not be ordered to be paid *de die in diem* by the defendant, but only the amount of the cash disbursements actually and properly made by the plaintiff's solicitor.

1145:—Where the plaintiff in an alimony action fails to obtain a judgment for alimony, no costs beyond the

amount of the cash disbursements actually and properly made by the plaintiff's solicitor, shall be ordered to be paid by the defendant.

The appeal was heard by BOYD, C., in Chambers, on the 27th November, 1899.

W. E. Middleton, for the defendant, contended that under Rule 1144 witness fees could not be ordered to be paid by the defendant unless and until they had been actually disbursed by the plaintiff or her solicitor.

J. H. Moss, for the plaintiff, contra.

Judgment was delivered on the following day.

BOYD, C.—In *Haffey v. Haffey* (1877), 7 P. R. 137, an application for money for witness fees in alimony, before the trial, was refused, and it was suggested that the proper course was to apply at the hearing to the presiding Judge. That course was adopted, and the Judge, Proudfoot, V.-C., at the hearing ordered the cause to stand till a sum necessary for witness fees was paid by the defendant. This is a very expensive method of securing payment of necessary money to enable the impecunious wife to have the merits of her controversy properly litigated, and entails more delay and outlay than if an order were made by anticipation. The statute then in force, 32 Vict. ch. 18 (O.), was quite as much against the trial Judge making an order by way of anticipation as the Judge or Master in Chambers. The present Rule 1144 is derived from that statute, with the addition that only the amount of cash disbursements *actually* as well as properly made by the plaintiff's solicitor shall be ordered to be paid *de die in diem* by the defendant; and, if applicable to this occasion and literally observed, would preclude the absolutely pauper wife from ever having her cause heard, because of the impossibility of paying witness fees. The Rule contemplates the recoupment of the solicitor for disbursements actually made by him, but it is not his part to advance money or to pay out

disbursements if his client does not furnish means to do so. Hence the Rule has been eased in its working, or rather, perhaps, applied in a *cy-près* manner. And the practice under it is sufficiently well defined to be adhered to as the course and method of the Court.

The rules that we have as to alimony costs are drawn from the old ecclesiastical practice. The principle acted on was this. The wife having no money to litigate with her husband, her costs were taxed *de die in diem* and ordered to be paid, and when everything was ready for the hearing, and nothing remained but the argument, an application was made on her part for costs, which resulted in a further amount being ascertained by the Registrar and deposited in Court. It was a rule that sometimes worked hardship, but it was upheld on the humane principle that the wife would be helpless and deprived of justice unless some such provision was made to defray her necessary expenses : see *White v. White* (1859), Searle & Smith at pp. 82, 83 ; *Sopwith v. Sopwith* (1860), 2 Sw. & Tr. 105. The same method to protect the wife was adopted by the Court where the wife was actual litigant : *Weber v. Weber* (1858), 1 Sw. & Tr. 219. So in one of the most recent cases, *Hurley v. Hurley*, [1891] P. 367, Collins, J., says : " The rule is that, whether the wife is successful or not, the husband is bound to provide her with the means of carrying on the litigation, and the practice has been for the Registrar to estimate a reasonable amount for her costs, which is either paid in or security is given for it."

This is, of course, modified by our General Orders, which limit the wife's costs, in case her action for alimony fails, to the amount of cash disbursements actually and properly made by the plaintiff's solicitor : Rule 1145. This is the same measure of costs which may be ordered before the wife's success or failure has been ascertained, and while the matter is *in dubio* : Rule 1144. To comply with this Rule literally, the amount of probable disbursements should be ascertained by the local registrar or taxing officer, and the money ordered into Court before the trial, to be drawn

upon according as the outlay is actually made by the solicitor. But, to avoid this roundabout method, the practice has been to order payment at once to the plaintiff's solicitor, upon his undertaking to account for all sums not actually and properly disbursed. This order it is of the competence of the local Master to make, as was recognized in *Knapp v. Knapp* (1887), 12 P. R. 105, by the Divisional Court. And this was the course of procedure observed in *Magurn v. Magurn* (1883), 10 P. R. 570; *Bradley v. Bradley* (1885), *ib.* 571; and *Lalonde v. Lalonde* (1885), 11 P. R. 143.

I will not interfere with the local Master's discretion in this case, the solicitor undertaking in the usual manner : costs to the wife of appeal.

HARRIS V. BANK OF BRITISH NORTH AMERICA.

Interpleader—Summary Application—Rule 1103 (a)—Money in Bank—Adverse Claims—Foreign Claimants—Discretion.

A summary application under Rule 1103 (a) for an interpleader order in respect of certain moneys deposited with the defendants in England, and claimed by the plaintiff by this action brought in Ontario, and also in England by the depositors, an English corporation, was dismissed:—*Held*, that the mere fact that an action was possible here, because a branch office of the bank was in Toronto, was not enough to attract to this forum the extraordinary or special remedy by way of interpleader, as against the English corporation; and a salutary discretion was exercised in refusing the application.

[November 28, 1899.—*The Master in Chambers.*]

[December 14, 1899.—*Rose, J.*]

[January 9, 1900.—*Divisional Court.*]

AN application by the defendants for an interpleader order. The facts are set forth in the judgment of the Master in Chambers, before whom the motion was argued on the 27th November, 1899.

John Greer, for the defendants.

R. D. Gunn, for the plaintiff.

W. H. Blake, for the Pioneer Trading Corporation of Klondike, Limited, claimants.

Judgment was delivered on the following day.

THE MASTER IN CHAMBERS.—The plaintiff and one A. J. Mangold, representing the Pioneer Trading Corporation of Klondike, Limited, having entered into negotiations for the sale of certain mining properties in the Yukon District by the plaintiff to Mangold, two bills of sale, one of which referred to the property in dispute as being the property known as 76 "A." below Discovery on Hunker, and dated 8th October, 1898, were executed by the plaintiff in favour of Mangold, and delivered to the defendants' agency at Dawson City, with the following letter and instructions:

"Dawson City, N. W. T., October 8th, 1898.

C. Cran, Esq.,

Manager, Bank of British North America,

Dawson Branch.

Dear Sir,—We beg to deposit with you this day two bills of sale from R. A. Harris to Aurel Joseph Mangold of properties of 80 "B." on Lower Bonanza and 76 "A." below Discovery on Hunker, with the following instructions:—

The said deeds to be held by you in escrow and to be forwarded by you to your branch in London, England, to be so held until the 7th day of April next, when the said deeds are to be returned to your branch in Vancouver to be delivered by them to the said R. A. Harris or his order, unless on or before the said 7th day of April, there be deposited to his credit in your branch in London, England, the respective sums of \$3,122.52, when the deed of sale regarding the property 76 "A." on Hunker is to be delivered to Mr. Mangold or his order, and the sum of \$6,622.50 when the deed regarding the property 80 "B." below on Bonanza is to be delivered to the said Mr. Mangold or his order, as aforesaid. If the said amounts be paid before the 7th day of April next, you will please instruct your branch in London to forward the same to your agency in Vancouver to be paid over immediately to the order of Mr. Harris.

Yours truly,

R. A. Harris,
A. J. Mangold."

The Pioneer Trading Corporation, on whose behalf Mangold was acting in the said sale, having received information from which it appeared doubtful whether the plaintiff's representations to Mangold in connection with the said sale were true, determined not to make any deposit to the credit of the plaintiff in the terms of the option in respect of the property 76 "A." below Discovery on Hunker, but, being willing to purchase the same if the plaintiff's representations in respect thereof proved to be true, caused Mangold, with their moneys and on their behalf, to pay to the defendants \$3,122.52 upon the following terms, set forth in a letter accompanying the money :

"7th April, 1899.

The Secretary,
The Bank of British North America, Limited,
3 Clements Lane, London, E.C.

Dear Sir,—Referring to the bill of sale held by you on behalf of Mr. R. A. Harris of a part share of the claim known as No. 76 "A." Hunker, and which document is to be handed over to me or my order on payment of the sum of \$3,122.52, I now hand you the equivalent of this amount, but, inasmuch as the bill of sale is not accompanied by any documents verifying the title to the property, I must request you to hold the money in escrow either here or at your bank in Vancouver until Mr. F. A. Darbishire, the manager of the Pioneer Trading Corporation of Klondike, Limited, on behalf of which company I negotiated this option, is satisfied the title is correct, when the money can be handed over to Mr. Harris in exchange for a properly executed bill of sale, for which Mr. Darbishire's receipt shall be your full and sufficient discharge.

Yours truly,
A. J. MANGOLD."

The manager of the Pioneer Trading Corporation, Mr. Darbishire, mentioned in the above letter, having ascertained that the representations of the plaintiff to Mangold

were untrue, and that he was not empowered to transfer a good and indefeasible title to the property in question, wrote the defendants at their branch in Victoria, B.C., as follows :

“ Dawson, Y.T., July 15th, 1899.

To the Manager, Bank of British North America, Vancouver, B.C.

Dear Sir,—With reference to the several cheques for \$3,122.52, \$6,622.50, and \$4,275, or any of them, which you hold in escrow in favour of Mr. R. A. Harris and Mr. Beeg, that is to say, the sums of \$3,122.52 and \$6,622.50 in favour of Mr. Harris, and the sum of \$4,275 in favour of Mr. Beeg, subject to my being satisfied that the titles respectively of No. 76 “A.” below on Hunker and No. 80 “B.” on Bonanza are correct, I now beg to cancel the said cheques or money orders so delivered in escrow to you, and to return the same to your London office, and be kind enough to notify Mr. A. J. McMullan, care of Messrs. Cox & Lafone, 17 Tower Royal, Cannon street, London, E.C., of your so doing.

I am advised by my Dawson solicitors that Messrs. Harris & Beeg, respectively, have no title to these claims. I will esteem it a favour if you will have the moneys returned to England with as little delay as possible.

Yours respectfully,

F. A. DARBISHIRE.”

The Pioneer Corporation have since the 26th August, 1899, as well as on that date, demanded the return of the said moneys from the defendants herein, and if I remember aright it was stated by counsel on the argument that they had brought an action in London, England, against the defendants for the recovery of the same.

The plaintiff issued a writ herein on the 5th September, 1899, for the recovery of the same sum and interest.

The defendants now apply for an interpleader order, and call upon the plaintiff, A. J. Mangold, and the Pioneer Trading Corporation, to state the nature and particulars of

their claims to the said sum of \$3,122.50 paid into the defendants' bank in London, England, on the 7th April, 1899, and for which the defendants are sued in this action.

Were it not for the fact that the defendants have a branch in this Province doing business, they could not have been sued in this Province. The dealings between the parties took place outside of the jurisdiction of this Court—the subject matter is outside of the jurisdiction—there is no breach of any contract within the jurisdiction. In my opinion, this application comes within the decision in *Re Benfield and Stevens* (1896-97), 17 P. R. 300, 339, and the claimants the Pioneer Trading Corporation should not be compelled to bring their claim against the defendants into this Province in order that our Courts may determine whether they or the plaintiff herein are entitled to the same. To use the words, except as to names, of Mr. Justice Street at p. 344: "It is true that (the applicant) offers to bring into Court here a sum of money sufficient to answer the claim; but he cannot thus satisfy his contract, which is to pay that sum at the city of (London, England, or Vancouver, B.C.); he cannot, without the consent of his creditors, transfer the situation of the debt from the (United Kingdom, or B.C.), to another country."

I have, therefore, no alternative in following *Re Benfield and Stevens*, than to dismiss this application with costs.

The defendants appealed from the order of the Master, and their appeal was heard by ROSE, J., in Chambers, on the 11th December, 1899.

John Greer, for the defendants.

D. O. Cameron, for the plaintiff.

W. H. Blake, for the Pioneer Trading Corporation of Klondike, Limited.

Judgment was delivered on the 14th December, 1899.

ROSE, J.—The facts are set out in the judgment of the Master in Chambers.

This is not a question of allowing a notice of motion in an interpleader proceeding to be served out of Ontario, pursuant to Con. Rule 162 (3). That was considered very fully in *Re Confederation Life Association and Cordingly* (1899), 19 P. R. 16, by the learned Chief Justice of the Common Pleas, who held that service of the notice might be allowed, although both claimants resided out of the Province. The moneys in dispute were payable under policies of the association, the head office of which was in Ontario. Nothing was determined as to what would be the effect of such service. The Divisional Court, composed of Armour, C.J., Falconbridge and Street, JJ. (19 P. R. p. 20), reversed the order made upon this judgment, holding that Rule 1103 (a) only applied where the person applying was sued or expected to be sued in this Province. As I understand the result of the judgment, it is that where either claimant resides out of Ontario, unless it can be shewn that he intends to sue the applicant within Ontario, the Rule does not apply, and, *à fortiori*, where both claimants reside out of the jurisdiction, and the one sought to be brought in has not sued and does not intend to sue the applicants in this Province. The case has been carried to the Court of Appeal, and did the decision involve the point which I have to consider, I should postpone giving judgment until judgment is given in appeal,* but here service has been allowed, and the question is: should the order be made?

The one claimant residing in Ontario, namely, the plaintiff, has sued in this Court; the other claimant, a corporation having its head office in London, England, is not in any sense within this Province, and, as far as appears upon the material, has not sued and does not intend to sue the applicant here. Indeed, it was stated by counsel for the corporation, and apparently assented to by counsel for the applicant and for the plaintiff, that the corporation

* In *Re Confederation Life Association and Cordingly* judgment was given by the Court of Appeal on the 25th January, 1900, reversing the decision of the Divisional Court: see *post* p. 16.

had brought an action against the bank in London, England, and had no intention whatever of bringing an action in this Province, and it objected to any order being made for the purpose of compelling it to litigate its rights here.

It is manifest I can make no order staying proceedings in the action now pending in England, or otherwise governing or controlling the corporation so as to prevent it from bringing any action it may be advised to bring in any Court outside of this Province. This difficulty was pointed out by the Court in the *Cordingly* case.

Assuming jurisdiction to make the interpleader order, and to bar the corporation in the event of its refusing to submit to the order of the Court, the bank would be in no better position, because, assuming further that the claim of the corporation was barred, and the plaintiff was declared entitled to the money, and the bank paid it over to the plaintiff, that would afford no defence to the action now pending in England.

Thus I am asked to do what apparently would result in no practical good, and the case seems to me to be an illustration of the impracticability of applying interpleader proceedings to a claimant outside of the jurisdiction who does not intend to bring an action in any of the Courts of this Province.

As has been pointed out by the Master in Chambers, the deposit of the deeds with the direction by the plaintiff to the bank under which it held them, was not made in this Province, but at Dawson City, Y. T. The money was deposited in London, England, and none of the parties had any dealings with each other in this Province. I do not think it can be said that the money which is the subject-matter of this dispute is in any sense within Ontario, and, carefully avoiding determining more than I am called upon to determine, I need only say that, on the facts of this case, it does not appear to me to be convenient or proper to make the order asked for.

I think there is much force in the contention that, in such a case as this, there is no jurisdiction to make such

an order, and were it necessary to do so, I would give my reasons arising from examination of the cases, especially *Credits Gerundeuse v. Van Weede* (1884), 12 Q. B. D. 171. That case has been considered in subsequent cases, all of which are referred to by Street, J., in *Re Benfield and Stevens* (1897), 17 P. R. 339, and some of which are referred to in Cababé on Interpleader, 2nd ed., pp. 27, 28.

I think the appeal fails, and must be dismissed with costs.

The defendants appealed from the order of ROSE, J., and their appeal was heard by a Divisional Court composed of BOYD, C., and FALCONBRIDGE, J., on the 8th January, 1900.

The same counsel appeared.

Judgment was delivered on the following day.

BOYD, C.—The transaction between Harris, the plaintiff, and the other claimants of the money in question (the Pioneer Corporation of Klondike), arose in Dawson City, Yukon Territory. It involved the payment of the money into the head office of the Bank of British North America, in London, England, to be there transmitted to the branch agency in Vancouver of that bank. It would appear that the money was deposited in the head office and transmitted to Vancouver, but only *sub modo* (or in escrow, as it is called in the papers), and that it has since been recalled to the London office, at the instance of the Pioneer Corporation, because of the alleged failure of title on the part of Harris. The cause of action, if any, arose in England or in British Columbia. An action has been brought in England by the Pioneer Corporation against the bank to recover the money. Another action has also been brought in Ontario by Harris against the bank for the same money. The mere fact that such an action may be possible here because a branch office of the bank is in Toronto is not enough to attract to this forum the extraordinary or

special remedy by way of interpleader as against the Pioneer Corporation resident in England.

I think a salutary discretion was exercised in refusing to allow or direct relief by way of interpleader against the Pioneer Corporation. The appeal should be dismissed with costs to that corporation.

FALCONBRIDGE, J.—I agree.

ALLCROFT V. MORRISON.

Security for Costs—Residence Out of Ontario—"Ordinarily Resident"—Rule 1198.

Rule 1198 provides that security for costs may be ordered, among other cases, in the following : “(a) Where the plaintiff resides out of Ontario ; (b) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario.”

The defendant's affidavit stated that the plaintiff was now residing out of the jurisdiction ; and also that he had no certain place of abode within the jurisdiction ; that he had hitherto resided out of the jurisdiction ; and at the conclusion of the pending suit intended to reside out of the jurisdiction. The plaintiff's affidavit stated that he had not for the past year nor had he now any fixed or ordinary place of abode either in or out of the Province of Ontario, his occupation requiring that he should be from time to time in England, the Province of Ontario, and the Province of New Brunswick :—

Held, that the actual residence abroad was still what *prima facie* entitled the defendant to security, and the plaintiff could not answer the application by shewing that he had no fixed residence at all.

Denier v. Marks (1899), 18 P. R. 465, overruled.

Judgment of a Divisional Court reversed.

[October 2, 1899.—*Ferguson, J.*]

[October 11, 1899.—*Divisional Court.*]

[November 20, 1899.—*Court of Appeal.*]

AN appeal by the defendant from an order of one of the local Judges at London dismissing a motion by the appellant for an order requiring the plaintiff to furnish security for the appellant's costs of the action, upon the ground that the plaintiff was resident out of Ontario, or was not resident within Ontario, within the meaning of Rule 1198, which provides that security for costs may be ordered,

among other cases, "(a) where the plaintiff resides out of Ontario; (b) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario." The facts are stated in the judgments.

The appeal was heard by FERGUSON, J., in Chambers, on the 30th September, 1899.

McEvoy, for the defendant.

H. D. Gamble, for the plaintiff.

Judgment was delivered on the 2nd October, 1899.

FERGUSON, J.—This is an appeal from an order of the local Judge at London refusing to make an order for security for costs. The ground on which the application by the defendant was rested was that the plaintiff was resident out of the Province, or that he was not resident within the Province of Ontario.

The affidavit that speaks with particularity in regard to the residence of the plaintiff, or, it may be said, in regard to the want of a place of such residence, states, that the plaintiff has not for the past year had, nor has he now, any fixed or ordinary place of residence either in or out of the Province of Ontario, his occupation requiring that he should be from time to time in England, the Province of Ontario, and the Province of New Brunswick.

The case *Denier v. Marks* (1899), 18 P. R. 465, was relied on by the respondent as decisive in his favour. I have perused the judgments in that case with care, and I am of the opinion that the statements of the law made by the learned Chief Justice, which were acquiesced in by the other member of the Court, after, as he says, having conferred with the Chief Justice of the Queen's Bench, are sufficiently comprehensive to include the present case, and I think I am bound, following that decision, to affirm the order appealed from and to dismiss this appeal. If I had to construe the Rules of Court on the subject without any guide or any judgment binding upon me, it is possible that I should not arrive at precisely the conclusion arrived at

in that case ; but, as matters stand, I have, as I think, only the one course to adopt.

The appeal will therefore be dismissed and the order or decision appealed from affirmed with costs.

The defendant appealed from the order of FERGUSON, J., and his appeal was heard by a Divisional Court composed of MEREDITH, C.J., ROSE and MACMAHON, JJ., on the 11th October, 1899.

McEvoy and *R. U. Macpherson*, for the appellant.

H. D. Gamble, for the plaintiff.

THE COURT, at the conclusion of the argument, dismissed the appeal with costs, following the case of *Denier v. Marks* (1899), 18 P. R. 465.

The defendant obtained leave and appealed to the Court of Appeal from the order of the Divisional Court.

The appeal was heard by BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 16th November, 1899.

J. M. Clark, Q.C., for the appellant.

H. D. Gamble, for the plaintiff.

Judgment was delivered on the 20th November, 1899.

OSLER, J.A.—By the practice of the Courts the place of the plaintiff's residence is required to be indorsed upon or given on the writ of summons : Rule 127, Form 1. It has never been suggested that the plaintiff can evade this obligation by stating in the writ or indorsement that he has no fixed or ordinary place of residence within the Province or elsewhere, any more than he could have so satisfied an order made under the former practice to declare in writing his profession or occupation and place of abode. And by Rule 1199, where it appears by the writ of summons or the indorsement thereon that the plaintiff resides out of the Province, the defendant may, after he has appeared in the action, obtain an order for

security for costs. And by Rule 1198 (1), security for costs may be ordered (a) where the plaintiff resides out of Ontario. It was always sufficient in order to make out a *prima facie* case for security for costs to state, as the defendant's affidavit does here, that the plaintiff is now residing out of the jurisdiction of the Court: *Hanmer v. Mangles* (1843), 12 M. & W. 313; Chitty's Forms, 10th ed., pp. 829, 830. The affidavit, indeed, goes further and states that the plaintiff has no certain place of abode within the jurisdiction; that he has hitherto resided out of the jurisdiction, and at the conclusion of the pending suit intends to reside out of the jurisdiction of the Court. An application so supported could not have been answered by shewing that the defendant had no fixed or ordinary place of residence anywhere either within the Province or without, which is what the plaintiff sets up in a somewhat skilfully drawn affidavit. The plaintiff might shew that his ordinary place of residence was within the jurisdiction, and that his absence was of a purely temporary character, or, if his ordinary place of residence was out of the jurisdiction, he might prove that he was possessed of substantial property within the jurisdiction, or he might have shewn that he was then actually residing within it, intending to remain there until the termination of the action. This last ground of answer to the application had, I think, been accepted in our practice long before the decision of the Court of Appeal in *Redondo v. Chaytor* (1879), 4 Q. B. D. 453, followed in *Ebrard v. Gassier* (1884), 28 Ch. D. 232, in which the point was very much considered and the practice so declared to be, with some expression of reluctance on the part of the Court. Subsequently a Rule was passed under the English Judicature Act, R. S. C., December, 1885, which was followed by us in our Rule 1498 of January, 1896, now clause (b) of the present Rule 1198, providing (as we have it) that security may be ordered when the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario. The object of the amended Rule clearly was not to limit the cases in which

security might be granted, but to add to them by altering the former practice as it had been settled by the cases referred to.

The Rule was considered in *Michiels v. Empire Palace Limited* (1892), 66 L. T. 132. The Divisional Court thought that security might be ordered under it, even though it should not appear that the plaintiff was in England solely for the purpose of prosecuting the action, and in the Court of Appeal it was said by Lindley, L. J., that the Rule was "purposely made vague and elastic, for anything short of a man actually living in this country might be a temporary residence. I apprehend that the real object of the Rule was to cover a case in which a foreigner ordinarily resident out of the jurisdiction would not be here when he was wanted. In the ordinary case of an Englishman who could not pay, he would not be ordered to give security." Upon this construction of the amended Rule the practice in other respects is not altered, and the first part of the Rule is left to its ordinary application. The actual residence abroad is still what *primâ facie* entitles the defendant to security, and the plaintiff cannot answer the application by shewing that he has practically no fixed residence at all.

When that is his predicament the only residence he can be said to have must surely be that which he would be obliged to give in the indorsement upon the writ, viz., the country or place where he happened to be when his action was commenced. If that were within the jurisdiction, he would have complied with the practice. If he afterwards changes it and goes abroad, he is unable to say that his residence has not become a foreign one so as to bring him within the first clause of the Rule and under an obligation to give security if so ordered.

I think it by no means follows that because under clause (b) a plaintiff may be ordered to give security even when resident within Ontario, he can when actually resident out of Ontario only be ordered to give it if his ordinary place of residence is not within Ontario. On the

contrary, it appears to me that in that case, *i.e.*, when resident out of Ontario, the onus is cast upon him to shew that his ordinary place of residence is within Ontario and that his absence is of a merely temporary character. I agree with the views of Ferguson and Rose, JJ., rather than with those which prevailed in *Denier v. Marks* (1899), 18 P. R. 465, and would, therefore, allow the appeal. I do not see that the order now in question was made as a matter purely of discretion, nor indeed has anything been shewn to take the case out of the ordinary rule.

The costs should be costs throughout to the defendant in the cause.

Moss, J. A.—The affidavit filed on behalf of the plaintiff in answer to the application for security for costs places it beyond reasonable question that the plaintiff mainly based his opposition to the order asked for upon the decision in *Denier v. Marks* (1899), 18 P. R. 465.

Ferguson, J., by whom the appeal from the order of the local Judge refusing an order for security was heard, noted that *Denier v. Marks* was relied upon by the plaintiff as decisive in his favour. My learned brother held that he was bound by *Denier v. Marks*, but there is little reason to doubt that, but for that case, he would have allowed the appeal.

The case, therefore, seems to resolve itself into the question of whether in *Denier v. Marks* a proper construction was placed upon Con. Rule 1198 (*b*).

Its forerunner was Rule 6 (*a*) of the English Order LXV. That was passed to correct the practice which had been affirmed in *Redondo v. Chaytor* (1879), 4 Q. B. D. 453, and *Ebrard v. Gassier* (1884), 28 Ch. D. 232, that when a person resided in England temporarily, he could not be required to give security for costs.

In *Michiels v. Empire Palace Limited* (1892), 66 L. T. 132, upon an application for security, Pollock, B., was of opinion that the Rule was only meant to apply to a case where the plaintiff had come into the jurisdiction for the

purpose of bringing an action. Upon appeals a Divisional Court and the Court of Appeal affirmed his order refusing security, but both apparently disagreed with his construction of the Rule. The Divisional Court considered that the true principle of the Rule was that security for costs might be ordered, although it should not appear that the plaintiff was in England solely for the purpose of prosecuting his action. In the Court of Appeal Lindley, L. J., said that the Rule was purposely made vague and elastic, for anything short of a man actually living in England might be a temporary residence, and he expressed the opinion that the real object of the Rule was to cover a case in which a foreigner ordinarily resident out of the jurisdiction would not be here when he was wanted. No construction was placed by him on the words "ordinarily resident out of the jurisdiction." In our Rule the words are "ordinarily resident out of Ontario."

If I rightly apprehend the view of Meredith, C. J., as expressed in *Denier v. Marks*, to be that it is essential to the application of the Rule to a plaintiff that he should be shewn to be "habitually present" in some place or country out of Ontario, that is, to have a fixed or settled place of residence in some such place or country, I am unable to agree with it.

I understand the aim of the Rule to be, to put it out of the power of a plaintiff who is *prima facie* subject to the provisions of sub-sec. (a) of Rule 1198 to relieve himself from giving security by shewing a temporary residence in Ontario, for example, as in *Redondo v. Chaytor*, that at the time the action was commenced he was within Ontario and had no present intention of departing, or, as in *Ebrard v. Gassier*, that though not within Ontario when the action was commenced, he had since taken up his abode there and had no present intention of leaving.

I venture to think that the important inquiry is, not *where* the plaintiff resides out of Ontario, but whether he is a person ordinarily resident *out of* Ontario. If he is, it is of no consequence where he resides or whether he has or has not a fixed place of abode elsewhere.

Sub-section (b) must be read in connection with sub-sec. (a). So read, it conveys the idea of residence out of Ontario, in the usual sense of the term, coupled with abiding within Ontario for a temporary period or a temporary purpose.

There can be a condition of residence in parts not within Ontario, and when that is found to be the case with regard to a plaintiff, he is to be subject to the same treatment as a plaintiff under sub-sec. (a), notwithstanding that he is bodily within Ontario for a temporary purpose.

The affidavits used on the application in this case shew that the plaintiff is ordinarily resident out of Ontario within the meaning of the Rule, as I understand it, and I think an order for security ought to have been made upon the material before the local Judge.

I would allow the appeal, but, in view of the state of the decisions, the costs may be made costs in the action to the defendant.

BURTON, C. J. O., MACLENNAN and LISTER, JJ. A., concurred.

PHAIR V. PHAIR.

Arrest—R. S. O. ch. 80, sec. 1—Intent to Quit Ontario—Intent to Defraud Creditors.

It is not sufficient for a creditor applying for an order for arrest under R. S. O. ch. 80, sec. 1, to shew the existence of a debt and that the debtor is about to quit Ontario; he must shew some other fact or circumstance which, coupled with those facts, points to an intent to defraud. *Shaw v. McKenzie* (1881), 6 S. C. R. 181, *Tooth v. Frederick* (1891), 14 P. R. 287, and the opinions of BURTON and MACLENNAN, JJ.A., in *Coffey v. Scane* (1895), 22 A. R. 269, followed.

The opinions of HAGARTY, C.J.O., and OSLER, J.A., in *Coffey v. Scane*, and of the latter in *Robertson v. Coulton* (1881), 9 P. R. 16, dissented from.

McVeain v. Ridler (1897), 17 P. R. 353, discussed.

Whether or not there is good and probable cause for believing that the intent to defraud exists, is a question of fact.

And where the defendant believed that his wife had no claim against him for alimony:—

Held, that he could not be intending to defraud her by leaving Ontario.

[November 28, 1899.—*Boyd, C.*]

[January 18, 1900.—*Divisional Court.*]

MOTION by the defendant to set aside an order in the nature of a *ca. re.* for the arrest of the defendant made by the Judge of the County Court of Perth in an action in the High Court for alimony, or to discharge the defendant from custody thereunder. The facts are stated in the judgments.

The motion was heard by BOYD, C., in Chambers, on the 27th November, 1899.

J. H. Moss, for the defendant.

Grayson Smith, for the plaintiff.

Judgment was delivered on the following day.

BOYD, C.—Upon reading all the papers and affidavits now before me (which were not in evidence before the learned County Judge), I have no reason to doubt that the defendant believed that his wife had no claim against him for alimony. Papers were executed by them and payments made which purport to be in satisfaction of all claims for future support—and, without prejudging what

may be the ultimate disposition of the action, I think that the defendant had no idea of defrauding his wife or any creditor in making arrangements to go to Manitoba. The affidavits in answer of independent witnesses, Storey and Code, displace any inference that might arise from the unanswered affidavit of the plaintiff, which was alone before the County Judge.

The order for arrest should be set aside, and all proceedings, including bail, thereunder. Costs may be dealt with at the hearing or on further order if the case is not prosecuted.

An appeal by the plaintiff from the order of BOYD, C., was argued by the same counsel before a Divisional Court composed of MEREDITH, C. J., ROSE and MACMAHON, JJ., on the 4th December, 1899.

Judgment was delivered on the 18th January, 1900.

ROSE, J.—This was a motion by way of appeal from an order of the learned Chancellor discharging the defendant from custody under a writ of *capias ad respondendum*.

The facts of this case, as far as material, are that the plaintiff and the defendant, both being advanced in years, the plaintiff being a widow with a family, and the defendant a widower, also with a family, intermarried in September, 1890. I am not sure that the ages of the parties are stated in the material, but on the argument they were stated as being between sixty and seventy. The parties lived unhappily together, and there were frequent separations. Eventually, in June, 1893, there was a deed of separation, in which the defendant agreed to pay to his wife \$1,000. Subsequently the parties came together, and the plaintiff insisted upon the payment of the sum of \$1,000 free from the conditions set out in the previous agreement. The defendant secured the payment of the money by a bond given to the plaintiff's brother, and under the bond was written an agreement by the trustee, the plaintiff's brother,

and the plaintiff, that the amount secured by the bond should "be received and accepted in full, not only of all interest of the said Rebecca Phair in the estate of the said Edward Phair, present and future, but also of all claims for maintenance in case any future separation should occur between the said Rebecca Phair and Edward Phair, but not while they may be living together, or in case from any cause whatever they should hereafter cease to live together, and also that the covenants to bar dower in the said deed of separation contained shall continue valid and enforceable, notwithstanding the present or any future cohabitation of the said parties, and that in case of any future separation all the provisions of the said deed of separation shall revive, so far as they remain unperformed and are applicable."

It appears from the affidavit of the plaintiff's brother, put in by the defendant, that, in his opinion, the plaintiff understood exactly the agreement she was entering into, and that she quite realized its apparent legal effect as freeing her husband and his estate from any claim by her in case of any future separation.

The husband sold the farm which he owned, being substantially his whole estate, and out of the proceeds paid off a mortgage, having a surplus of between \$2,000 and \$3,000, out of which surplus he paid the plaintiff the \$1,000. Of course, if such an agreement were valid in law, it would be an answer to the plaintiff's claim for alimony, and, assuming that it is invalid as being contrary to public policy, as it provides for future separation, still it is of moment in considering the intention of the defendant, and I agree with the finding of fact of the learned Chancellor when he said that the defendant believed that his wife had no claim against him for alimony.

Assuming, however, that the plaintiff has a good cause of action, it is now necessary to consider whether upon the evidence the defendant was about to quit Ontario with intent to defraud his creditors generally or the plaintiff in particular.

I think no one can doubt that the Chancellor arrived at the proper conclusion of fact when he said, "I think that the defendant had no idea of defrauding his wife or any creditor in making arrangements to go to Manitoba," and that his order must be affirmed unless there is a presumption of law, irrebuttable, on such a state of facts as we have before us, that the defendant was about to quit Ontario with intent to defraud.

It was argued before us that, if a debtor was about to quit Ontario leaving a creditor's claim unsatisfied and making no provision for its payment, not only was a *primâ facie* case made out, but that practically that *primâ facie* case could not be rebutted. This is clearly not the law. I need not review the history of the legislation, which may be found in *Shaw v. McKenzie* (1881), 6 S. C. R. 181, and in *Tooth v. Frederick* (1891), 14 P. R. 287.

In *Shaw v. McKenzie* Taschereau, J., in delivering the judgment of the Court, said (p. 187): "In fact, not only in this case, but also in their original case against the appellant, and by the very terms of their own affidavit, upon which they arrested the appellant, it is clear and apparent that the respondents were and are under the impression that the fact alone of the departure of their debtor from the country was a sufficient ground to arrest him. Now, that is not the law. Under Article 798, C. C. P., the affidavit required to obtain a writ of *capias* must shew 'that the defendant has reason to believe, and verily believes, for reasons specially stated in the affidavit, that the defendant is about immediately to leave the Province of Canada with intent to defraud his creditors in general or the plaintiff in particular.'"

The words of our statute are: "And also by affidavit shew such facts and circumstances as satisfy the Judge that there is good and probable cause for believing that such person, unless he be forthwith apprehended, is about to quit Ontario with intent to defraud his creditors generally or the said party or plaintiff in particular."

Whether the arrest be under the provisions of the Code in Quebec, or under R. S. O. ch. 80 in Ontario, it is clear that, in addition to shewing that the plaintiff has a cause of action as is provided for by the section, he must also shew by his affidavit facts and circumstances to satisfy the Court that there exists an intent to defraud. In other words, the mere fact that one is about to quit the Province without providing for the payment of a debt is not of itself sufficient to shew intent to defraud.

The affidavit in *Shaw v. McKenzie* shewed the existence of a debt ; that the defendant was about to leave Canada "with intent to defraud his creditors in general and the plaintiffs in particular, and that such departure will deprive plaintiffs of their recourse against the said William J. Shaw ; that the reasons of the said deponent for stating his belief as above, are : that Mr. Powis, the deponent's partner, was informed last night in Toronto, by one Howard, a broker, that the said W. J. Shaw was leaving immediately the Dominion of Canada, to cross over the sea for Europe or parts unknown, and deponent was himself informed, this day, by James Reid, broker, of the said W. J. Shaw's departure for Europe and other places ; and further deponent saith not." After setting out this clause of the affidavit, Mr. Justice Taschereau proceeds : "Now, where are, in this affidavit, the reasons why the deponent construes Shaw's departure for Europe as done or projected with an intent to defraud ? The deponent does not even attempt to give any. The existence of the debt and the departure from the country are, for him, sufficient to constitute an intent to defraud."

It was stated at argument in that case that all the Judges in the Court below held that the affidavit was insufficient, "and that the *capias* could have been quashed on the ground that McKenzie should have specially stated in his affidavit his reasons for believing that Shaw's leaving Canada was 'with intent to defraud his creditors in general and the plaintiff in particular.' The only reason given was that the appellant was about leaving the Province."

Then we have the case of *Tooth v. Frederick* (1891), 14 P. R. 287, where the learned Chancellor, in delivering the judgment of the Court, said, referring to the distinction "between the earlier English statute and that development of it which is now in force in Ontario," as follows: "The intention of the former was apparently to prevent English debtors leaving the jurisdiction of the Court; but our law was expressly enacted so as to restrain the freedom of those only who were believed to be contemplating fraud as against their creditors." And in *Coffey v. Scane* (1895), 22 A. R. 269, Mr. Justice MacLennan, in a judgment which was concurred in by the present Chief Justice of Ontario, said (p. 274): "In my judgment the mere fact of a debtor intending to leave or having left Ontario is not of itself sufficient to raise the inference of an intention to defraud creditors, but on the contrary other facts and circumstances must be shewn from which that inference may properly be drawn."

I take it, therefore, that it is clear that it was the opinion of the Supreme Court, of the Chancery Divisional Court in *Tooth v. Frederick*, and of at least two members of the Court of Appeal in *Coffey v. Scane*, that it is not sufficient for a creditor applying for a writ of *capias* to shew, to obtain an order for arrest, the existence of a debt and that the debtor is about to quit Ontario. He must shew some other fact or circumstance which, coupled with the other facts, points to an intent to defraud. If there were no other decisions to be considered this proposition would be unmistakably clear.

In *McVeain v. Ridler* (1897), 17 P. R. 353, my learned brother Falconbridge, delivering the judgment of a Divisional Court, said that, in his opinion, *Tooth v. Frederick* was practically reversed by *Coffey v. Scane*, and an order was made "restoring the order for the arrest of the defendant made by the learned junior Judge." The application to the Judge below was for discharge from custody, and the order for discharge was made, the learned Judge finding "that the defendant originally left Ontario to better his

condition; that he had to borrow money to get away; that there was no evidence that he had any property or assets wherewith to meet his debts; that he had therefore rebutted the presumption that his original leaving was with intent to defraud; and that, having been arrested in Ontario upon a temporary visit to attend his mother's funeral, intending to return to his domicile in the United States of America, his proposed return was not with intent to defraud." That Divisional Court, therefore, being of the opinion that *Tooth v. Frederick* had been reversed by *Coffey v. Scane*, and that *Coffey v. Scane* shewed that these facts would not be sufficient to rebut the presumption of intent to defraud, made the order, as I have said, refusing therefore for such reason to follow the decision in *Tooth v. Frederick*.

At the most the decision in *McVeain v. Ridler* was that the fact that the defendant originally left Ontario to better his condition, and that he was taking no assets out of the country, was not sufficient to rebut the presumption that his original leaving was with intent to defraud, and is in no sense an authority that the original presumption cannot be rebutted.

I venture to think, for reasons which I shall hereafter give, that the authority of *Tooth v. Frederick* is not shaken by the decision in *Coffey v. Scane*.

The Court in *McVeain v. Ridler* assumed that the case of *Robertson v. Coulton* (1881), 9 P. R. 16, was set up by the decision in *Coffey v. Scane* as against the attack made upon it in *Tooth v. Frederick*. With the greatest respect, I do not think it was. Mr. Justice Osler in *Robertson v. Coulton* said (p. 18): "I think the plaintiff has nothing to do with the defendant's reasons. The facts are enough for him. The defendant is indebted to him, and he is about to withdraw himself from the jurisdiction. That has always been considered sufficient to warrant an arrest." It was this observation, no doubt, that the learned Chancellor referred to in *Tooth v. Frederick* (1891), 14 P. R. at p. 289, when he said: "Some expres-

sions which look that way in *Robertson v. Coulton*, 9 P. R. 16, are, I venture to think, too broadly expressed, inasmuch as, in my opinion, two things must concur before the statute operates, (1) the quitting of Ontario, and (2) an intent thereby to defraud creditors or the particular creditor."

In *Coffey v. Scane* (1895), 22 A. R. 269, Hagarty, C.J.O., no doubt did state a proposition at p. 269 which supports the view of Mr. Justice Osler in *Robertson v. Coulton*, saying: "If the defendant"—the plaintiff in the proceedings in which the plaintiff was arrested—"had confined himself to the statement that the plaintiff contracted the debt in Canada, then went to the foreign country largely indebted, and after a year there had returned to Ontario, and satisfied the Judge that he was again immediately about to leave, or information to that effect, I hardly see what tenable objection could be taken to the proceeding; the Judge might well consider that a case was made out to warrant a *capias*." But Mr. Justice Maclellan, in the paragraph to which I have referred, expressly dissented from the view of the learned Chief Justice, in these words (p. 273): "I am, however, with great respect, unable to concur in the broad statement of the law by the learned Chief Justice in the present case, that the intent to defraud is to be inferred from the mere intention to quit Ontario on the part of a debtor." As I have said, the present Chief Justice of Ontario agreed to such judgment.

I do not see anything in the judgment of Mr. Justice Maclellan that indicates that he preferred the view of the law as laid down in *Robertson v. Coulton* to the one enunciated in *Tooth v. Frederick*, upon the question as to what constitutes sufficient to entitle a creditor to the order for arrest of his debtor, and I have come to the conclusion that the weight of authority is in favour of the proposition laid down by the learned Chancellor as the judgment of the Court in *Tooth v. Frederick*, which I have above quoted.

I have not forgotten my observations in *Vansickle v. Boyd* (1892), 14 P. R. 469, with reference to the construction to be placed upon *Toothe v. Frederick* and *Rogers v. Knowles* (1891), 14 P. R. 290*n.* (see 14 P. R. pp. 474-75), but I desire that what I there said should be qualified by the effect of the decisions to which I have now referred.

But, assuming that the law is as contended for, that all that is necessary to make out a *prima facie* case is to shew the existence of a debt and the intent of the debtor to leave the Province without arranging for the payment of the debt, that does not dispose of this case, for it is clear on all the authorities that the defendant may shew, if he can, that he was not intending to leave the Province with intent to defraud. Even in *Robertson v. Coulton* (1881), 9 P. R. 16, Mr. Justice Osler said (p. 18): "If upon reconsidering the facts stated in the affidavit upon which I made the order for the arrest, or those now stated in the defendant's affidavit filed on this application, I could see any reason for thinking that the defendant was not about to quit Ontario with intent, etc., I would allow the notice of motion to be amended by asking that the defendant should be discharged out of custody on that ground." And in addition to the cases to which I have already referred on the other branch, I would refer to *Elgie v. Butt* (1899), 26 A. R. 13.

It then comes down to be a question of fact, whether on the evidence before us the defendant was about to quit Ontario with intent to defraud. None of the cases cited has facts similar to those in the case we are considering, and I have arrived at the same conclusion as did the learned Chancellor when he stated: "I have no reason to doubt that the defendant believed that his wife had no claim against him for alimony." If the defendant did not know, or, what on the facts of this case amounts to the same thing morally, did not believe, that the plaintiff had a claim against him, but, on the contrary, believed that he had satisfied all claims which she had against him, it seems

impossible to come to the conclusion that he was intending to defraud her by quitting the Province.

Assume that a man had an agent resident in Ontario who contracted a debt for which the principal was in law responsible, but of which he was entirely ignorant, and the principal was about to quit Ontario, and assume that as a matter of law it was sufficient to shew the fact of the existence of the debt and that the debtor was about to quit Ontario without making provision for its payment, and that the debtor, the principal, shewed conclusively to the Court that he had no knowledge of the existence of the debt at the time he was about to quit Ontario, could it possibly be held that he was about to quit Ontario with intent to defraud that creditor? To so construe the statute would, in my opinion, be to declare that the Legislature prohibited every debtor from leaving the Province without paying or securing the payment of his debts.

For these reasons, I think the appeal must be dismissed.

MEREDITH, C. J.—I should not have done more than express my concurrence with the view of the learned Chancellor and that of my brother Rose as to the proper order to have been made on the motion of the defendant for his discharge, were it not for the importance of the general question involved and the conflict of judicial opinion as to it.

A creditor desiring to obtain a Judge's order for the arrest and holding to bail of his debtor is required by R. S. O. ch. 80, sec. 1, to shew by affidavit to the satisfaction of the Judge, besides the existence of the cause of action, "such facts and circumstances as satisfy the Judge that there is good and probable cause for believing that such person," *i. e.*, the debtor, "unless he be forthwith apprehended, is about to quit Ontario with intent to defraud his creditors generally or the said party or plaintiff in particular."

Proof of the existence of the debt and that the debtor unless he is forthwith apprehended is about to quit Ontario

is plainly not sufficient to justify the making of the order. There must also be shewn the existence of facts and circumstances which are sufficient to justify the conclusion that there is reasonable and probable cause for believing that the intent of the debtor in quitting Ontario is to defraud his creditors generally or the particular creditor.

Whether or not there is reasonable and probable cause for believing that the intent to defraud exists, is a question of fact to be determined as is any other question of fact, and it is, therefore, impossible to lay down any general rule applicable to all cases as to what is sufficient to establish the fact. Each case must be determined on its own facts and circumstances.

It seems to be thought by some Judges that the intention of the debtor to permanently withdraw himself from the Province without paying or making provision for the payment of his debts raises an irrebuttable presumption that his intent is to defraud his creditors. With that view I am unable to agree, and I am inclined to think that it has been adopted in consequence of the decisions under the English Act 1 & 2 Vict. ch. 110, sec. 3.

The English Act, however, differs in its language from the analogous provision of our Act, in that all that it requires to be shewn is that the debtor is about to quit England, irrespective of the intent with which he is quitting, but even this general language was held to be subject to some limitation. That was determined in the case of *Larchin v. Willan* (1838), 4 M. & W. 351, where the principle by which the Judges were to be guided in allowing arrests under the Act was decided to be "to consider whether the defendant is about to leave the country for such a time that he is not likely to be forthcoming to satisfy the plaintiff's execution at the period when he will be entitled to it in the ordinary course of law proceedings."

The first Provincial legislation on the subject is 34 Geo. III. ch. 2, sec. 6.

This legislation, in as far as it provided safeguards

against unfounded or vexatious arrests, was much in advance of the legislation in England, by the law of which a creditor was then entitled to have his debtor arrested where his cause of action was a certain debt, or damages which might be reduced to a certainty, of the prescribed amount, on filing an affidavit of his cause of action, and this altogether irrespective of any intent of the debtor to leave England.

Section 6 of the Provincial Act forbade arrest upon process in a civil suit, unless an affidavit should be first made by the plaintiff that the defendant was justly and truly indebted to him in a sum certain, which, together with the account for which it became due, should be specified, and also that the deponent verily believed the defendant was about to leave the Province with an intent to defraud his creditors.

Various changes were made from time to time in the Provincial law as to arrest on civil process prior to the Act of 1858, commonly known as the Act for the abolition of imprisonment for debt, 22 Vict. ch. 96. The provisions of sec. 2 of that Act are in substance those of the Revised Statute as to the question now under consideration, except that instead of quitting Ontario it was quitting Canada that was required to be shewn.

It is unnecessary for my purpose to refer to all the various enactments between 1794 and 1858, but two of them have an important bearing upon the subject under consideration, and to them a brief reference may be made.

Section 8 of 2 Geo. IV. ch. 1, after reciting as follows: "And whereas much inconvenience is felt by conscientious creditors in the recovery of their just debts, from the difficulty of ascertaining whether any person or persons design leaving the Province, with an intent to defraud their creditors, an affidavit of which is required by the laws now in force," substituted for the affidavit then required one by which the creditor, his servant or agent, was not required to swear to the intent of his debtor being that mentioned in the recital, but that "the plaintiff, his servant or agent, is appre-

hensive that the defendant will leave this Province without satisfying the plaintiff's debt, and that the said plaintiff, his servant or agent, does not sue out such process from any vexatious or malicious motive whatever."

Beyond a change as to the lowest amount for which a debtor should be liable to arrest, the law remained as it was enacted by 2 Geo. IV. ch. 1, until 1845, when by 8 Vict. ch. 48, sec. 44, it was again made requisite that the affidavit should state that the deponent had good reason to believe and did verily believe that the defendant was immediately about to leave Upper Canada with intent and design to defraud the plaintiff of his debt.

It has already been seen what the principle of the English Act has been judicially determined to be. The language of the Provincial Acts and the history of Provincial legislation indicate, in my opinion, that the policy and principle of the latter, except during the period when 2 Geo. IV. ch. 1, sec. 8, was in force, was a different one, and that the intent to defraud, as well as the quitting of the Province, was necessary to justify the arrest of the debtor, and that difference is, I think, brought out clearly by the recital to and provisions of sec. 8.

Being clearly of this opinion, and not being, as I think we are not, bound by any decided case to come to a contrary conclusion, and being, as I am, of opinion that the conclusion reached by the learned Chancellor was one warranted by the evidence before him, it follows that, in my opinion, his order should be affirmed, and the appeal from it dismissed with costs.

MACMAHON, J., concurred.

SUPREME COURT OF THE INDEPENDENT ORDER OF
FORESTERS V. PEGG ET UX.

Summary Judgment—Rule 603—Mortgage Action—Claim for Immediate Possession—Recovery of Land—Rules 138, 141.

A writ of summons was indorsed under Rule 141 with claims for foreclosure of a mortgage, and for immediate recovery of possession of the mortgaged premises, and for immediate payment of the mortgage money :—

Held, that it could not be said to be specially indorsed under Rule 138 so as to entitle the plaintiffs to move under Rule 603 for summary judgment for recovery of land.

Decision of a Divisional Court affirmed.

[September 13, 1899.—*Rose, J.*]

[September 15, 1899.—*Divisional Court.*]

[January 25, 1900.—*Court of Appeal.*]

THE writ of summons in this action was issued on the 19th July, 1899. The indorsement was as follows :—

“The plaintiffs’ claim is on two certain mortgages dated the 26th day of March, 1895, made between the defendant Wilfred Woodruff Pegg, mortgagor, of the first part, the plaintiffs, of the second part, and the defendant Annie Pegg, of the third part, and that the said mortgages may be enforced by foreclosure, and to recover from you the defendant Wilfred Woodruff Pegg payment of the amount due under a covenant by you in that behalf contained in the said mortgages and each of them.

“And take notice, further, that the plaintiffs claim to be entitled to recover immediate possession of the mortgaged premises.

“And take notice that the plaintiffs claim that there is now due by you for principal money the sum of \$34,311.77, and for taxes and insurance premiums the sum of \$379.03, and for interest the sum of \$5,260.90, and that you are liable to be charged with these sums, and subsequent interest to be computed at the rate of five per centum per annum, and costs, in and by the judgment to be drawn up, and that in default of payment thereof, within six calendar months from the time of drawing up the judgment, your interest in the property may be foreclosed, unless before

the time allowed you for appearance you file in the office within named a memorandum in writing * * .

“ If you desire a sale of the mortgaged premises instead of a foreclosure, and do not intend to defend the action, you must, within the time allowed for appearance, file in the office within named a memorandum in writing * * .

“ The following is a description of the mortgaged premises * * .

“ And the plaintiffs’ claim is also on an assignment by way of mortgage of a certain policy of life assurance upon the life of the defendant Wilfred Woodruff Pegg in the Canada Life Assurance Company, being policy number 46373 A. 1, for the sum of \$10,000, which policy was assigned as collateral security to the said mortgages, and to have the equity of redemption of the defendants and each of them therein foreclosed.

“ The plaintiffs claim interest on the above mentioned several sums at the rate of five per centum per annum until judgment, and the sum of \$20 for costs; and if the amount claimed be paid to the plaintiffs or their solicitors within eight days from the service hereof, further proceedings will be stayed.”

The defendants having appeared, the plaintiffs made a motion “ for an order that the plaintiffs be awarded judgment in this action against the defendants Wilfred Woodruff Pegg and Annie Pegg for the amount indorsed on the writ, with interest, if any, and costs; and for an order that the defendants do forthwith deliver to the plaintiffs immediate possession of the mortgaged premises mentioned in the writ of summons; and for such further or other order as may seem just.”

In support of the application an officer of the plaintiffs made an affidavit stating that the writ contained a special indorsement as against the defendant Wilfred Woodruff Pegg for the amount due by him under the covenants contained in two certain mortgages which it was desired to enforce in this action by foreclosure; that the defendant Wilfred Woodruff Pegg was in respect of the said

covenants justly and truly indebted to the plaintiffs at the commencement of the action in the sum of \$39,951.72; that there was no defence to the action, etc.

On the 1st September, 1899, the Master in Chambers, upon this application, made an order for judgment for the plaintiffs against the defendant Wilfred Woodruff Pegg for \$25,000; and further, that the defendants should forthwith deliver to the plaintiffs possession of the lands and premises in question; and that the plaintiffs should be at liberty to proceed for the remainder of the relief claimed.

Both the defendants appealed from the order of the Master, and the appeal was heard by ROSE, J., in Chambers, on the 11th September, 1899.

T. H. Lennox, for the defendant W. W. Pegg.

S. B. Woods, for the defendant Annie Pegg.

James Bicknell, for the plaintiffs.

Judgment was delivered at the close of the argument.

ROSE, J.—I do not know that I feel much difficulty with regard to the claim for delivery of possession, nor indeed as to the jurisdiction of the Master to make an order for immediate payment of the money. The question is new, and arises upon a consideration of Rules 138, 139, 141, and 603.*

*138.—1. The writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled, where the plaintiff seeks to recover a debt or liquidated demand in money * * arising—

(a) Upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt); or

(b) On a bond or contract under seal for payment of a liquidated sum; or

* * * *

(f) In actions for the recovery of land (with or without a claim for rent or mesne profits); * *

2. Such special indorsement shall be to the effect of such of the forms in sec. II. of Part II. in the Appendix as are applicable.

139. Where the plaintiff's claim is for or includes a debt or liquidated demand, the indorsement, besides stating the nature of the claim, shall

The forms given in sec. II. of Part II. relate to money claims, one of them being for principal and interest due under a covenant.

The forms given in sec. VI. of Part II. relate to claims for equitable relief, one of them being by a mortgagee for foreclosure and for immediate payment and possession.

Under Rule 138 a writ may be specially indorsed in the cases there mentioned, and if forms of special indorsement are provided in sec. II. of Part II. in the Appendix, as far as they are applicable they are to be used ; but, whether such forms are or are not used, in cases provided for by Rule 139, certain requirements are enacted. By Rule 141 the writ must be specially indorsed as provided by Rule 138, but such special indorsement, as I read it, must be in accordance with the requirements of Part II., sec. VI. In other words, when you look for information with regard to a mortgage, where the special indorsement relates to anything that comes under the heads of the sub-sections of Rule 138, you must have the information which is required in Part II., sec. VI., of the Appendix. If that is not so, if there is no right to grant immediate judgment under Rule 603 for payment of the covenant money, you will have this anomaly, that if a covenant were in a document separate from the conveyance of the land, you could bring

state the amount claimed in respect of such debt or demand, and for costs, respectively, and shall further state that upon payment thereof within eight days after service * * further proceedings will be stayed. Such statement may be according to Form No. 6 * * .

141. A claim for the foreclosure of a mortgage or for the sale or redemption of mortgaged property, or for immediate delivery of possession, or for immediate payment, shall be indorsed in accordance with the Forms in the Appendix, Part II., sec. VI., applicable thereto.

603.—(1) Where the defendant appears to a writ specially indorsed under Rule 138, and the plaintiff is not entitled to a judgment or order under the preceding Rules, he may * * move * * for final judgment for the claim so indorsed, with interest, if any, and costs * * .

(2) Such motion may be made in respect of a cause of action specially indorsed under Rule 138, though the writ may also be indorsed with any other claim, and such order may be made in respect of the cause of action so specially indorsed as might be made if no other claim were indorsed on the writ of summons.

your action on the covenant, and you clearly could indorse under Rule 138, as coming under the provisions of one of the sub-sections, whereas, if you had that covenant contained in one document with the conveyance of the mortgaged land, you could not.

I think what is meant is that in any case where a matter is brought under one of the sub-heads of Rule 138, you may specially indorse and you may have judgment under Rule 603, and in cases provided for in Rule 141 which also come under 138 you must have the special indorsement as provided for in the forms given in Part II., sec. VI. And so, having regard to sub-sec. (2) of Rule 603, judgment may be given for the immediate payment of money upon the indorsement under the provisions of Rule 138, but you must have the forms complied with, that is, the information given as provided by Rule 141.

I do not think the point is well made that you may not have an action for the recovery of land, because all that you are obtaining is recovery of possession of land. The forms provide simply for judgment for possession, and if there is any distinction to be drawn between recovery of land and recovery of possession of land, the judgment confines it as the argument would confine it, and the provision of Rule 138 for the recovery of land must be taken as broad enough to cover both claims for the recovery of possession of land and claims where the title is determined between the parties for all time. I make no distinction in my own mind, because I find the expression "recovery of land" in sub-sec. (f) of Rule 138, and referring to the forms I find that the judgment is for possession.

I need not further consider whether the judgment on the covenant should stand, because counsel for the plaintiffs is not unwilling that the whole debt may be inquired into at the trial. As the case must go down for trial now within a comparatively few days, and as a portion of the claim must be inquired into, the whole indebtedness may be inquired into.

The learned Judge took time to consider whether a defence to the action was raised or suggested by affidavits and documents filed by the defendants, and on the 13th September, 1899, stated that he found nothing to enable him to say that there was any defence shewn to the motion for judgment for immediate possession, and accordingly dismissed the appeal with costs.

The order as drawn up and issued by the plaintiffs dismissed the appeal with costs, and ordered, upon the consent of the plaintiffs, that the judgment granted by the Master in Chambers for \$25,000 should not be enforced, but that the same should be subject to be increased, reduced, or otherwise dealt with by the Judge at the trial.

From this order the defendant Annie Pegg appealed, and her appeal was heard by a Divisional Court composed of ARMOUR, C.J., and STREET, J., on the 15th September, 1899.

S. B. Woods, for the appellant.

James Bicknell, for the plaintiffs.

THE COURT, at the conclusion of the argument, allowed the appeal with costs, holding that the writ of summons was indorsed under Rule 141, and not under Rule 138, and judgment could be given under Rule 603 only where the writ was indorsed under Rule 138.

The plaintiffs appealed (by leave) from the order of the Divisional Court, and their appeal was heard by OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., and FERGUSON, J., on the 24th January, 1900.

James Bicknell, for the appellants, contended that the part of the indorsement claiming the recovery of immediate possession was a perfectly good indorsement under Rule 138, and the plaintiffs were entitled to judgment under Rule 603.

S. B. Woods, for the defendant Annie Pegg, the respondent—

ent, contended that the indorsement was under Rule 141, not 138, and the procedure should be under Rule 596, not Rule 603. A claim for the immediate delivery of possession cannot be said to be the same thing as an action for the recovery of land. The possession which a mortgagee gets under an order for immediate possession is an interim possession, subject to the right to redeem, and is not recovery of the land at all. In this form of action the recovery is by means of the foreclosure: *Heath v. Pugh* (1881-2), 6 Q. B. D. 345, 7 App. Cas. 235.

Judgment was delivered on the following day.

OSLER, J. A.—The question is whether a writ can be said to be specially indorsed under Rule 138 (*f*) as in an action for the recovery of land, so as to entitle the plaintiff to move for summary judgment under Rule 603, where the only indorsement upon it is in the form appropriate to a foreclosure action under Rule 141.

The Court below has held that a writ so indorsed can not be said to be specially indorsed under Rule 138, so as to entitle the plaintiff to summary judgment, and that where the plaintiff is seeking foreclosure or sale, though the indorsement does ask for the immediate delivery of possession of the mortgaged land, it is not an indorsement of a claim for the recovery of land under Rule 138 (*f*).

I do not see my way to differ from this conclusion.

It may be that if the Court below had arrived at a different result, it could not be said to be an absolutely wrong construction of the Rules, because the "recovery" of the land, if delivery of possession could be regarded as such, would necessarily be according to the plaintiff's title—in this case simply as mortgagee.

The important thing, however, is to have the practice settled in one way or the other, and no serious inconvenience can ever result from the construction which the Court below has placed on the Rules. It may seem singular that where the plaintiff indorses his writ

with a claim for immediate delivery of land as incident to the other relief sought in a mortgage action, he should not be entitled to move for summary judgment as in an action for the recovery of land under Rule 138 (*f*). But the Rule which enables a plaintiff to move for summary judgment (603) does not apply to proceedings under Rule 141, which furnishes the code or system of procedure specially intended for the mortgage action. It cannot, therefore, be affirmed that the action for the recovery of land under Rule 138 (*f*) is the same kind of action as one under Rule 141 for the foreclosure of a mortgage and the immediate delivery of possession as incident thereto. In one sense, no doubt, the latter is an action for the recovery of land, by extinguishing the mortgagor's title, but there is no recovery as such until the final order of foreclosure. The immediate delivery of possession in such an action is not really upon a judgment for the recovery of land, but a special relief granted to the plaintiff *pendente lite*, different in character from the judgment which a plaintiff seeks when he indorses his writ with a claim under Rule 138 (*f*).

For these reasons I am of opinion that the judgment of the Divisional Court should be affirmed and the appeal dismissed with costs.

MACLENNAN, J. A.—I agree.

MOSS, J. A.—I am of the same opinion. Mr. Woods made very clear the reason for the existence of the two Rules, and why there were separate remedies provided. His argument shewed, I think, that there was some intention in making the difference of language in Rules 138 and 141. The former speaks of an action for recovery of land. That is not the same as what is said in Rule 141. That Rule, or the indorsement under it, speaks of an action for the recovery of possession of the mortgaged premises. The recovery of possession of the mortgaged premises is a qualified recovery—a recovery subject to the

rights of the mortgagor—and when it is shewn by the indorsement on the writ under Rule 141 that that was what was intended and nothing more, the plaintiff cannot seek to obtain judgment under Rule 603.

LISTER, J. A., concurred.

FERGUSON, J.—I agree in the conclusion arrived at by my learned brethren. I have only to remark that the indorsement for the recovery of land under Rule 138 is, as I think, for a thing quite different from the indorsement for immediate possession of land under Rule 141. The possession is not the same in character and kind as the other possession, and the contention that the indorsement in question contained the equivalent of an indorsement under Rule 138, so that summary judgment might be moved for under Rule 603, is fallacious. I think the contention of Mr. Woods is unanswerable just on that ground. I agree in the judgment.

RE CONFEDERATION LIFE ASSOCIATION AND CORDINGLY
ET AL.

Interpleader—Summary Application—Rule 1103 (a)—Insurance Moneys—Adverse Claims—Foreign Claimants—Notice of Motion—Service Out of Jurisdiction—Rule 162 (3).

Certain moneys were payable by an insurance company under several life policies in favour of the assured, his executors, administrators, or assigns. The moneys were claimed by the executors, who resided in Manitoba, where the assured died, and who were threatening suit there, and also by the widow, who resided in Quebec, and had brought an action against the company there. The company's head office was in Ontario, and they launched an application in the High Court for a summary interpleader order:—

Held, reversing the decision of a Divisional Court, 19 P. R. 16, and restoring that of MEREDITH, C. J., *ib.*, that the company were entitled to avail themselves of the provisions of Rule 1103 (a), as persons under liability for a debt in respect of which they were, or expected to be, sued by two or more persons; and service out of Ontario of the company's notice of motion for the interpleader order was properly allowed under Rule 162 (3).

[January 25, 1900.—*The Court of Appeal.*]

THIS was an appeal by the Confederation Life Association from the order of a Divisional Court (*ante* 16) reversing an order of MEREDITH, C.J., in Chambers, and setting aside an order of the Master in Chambers allowing service to be effected on Sarah Elizabeth Langridge in Montreal, in the Province of Quebec, of a notice of motion by the association for an interpleader order in respect of certain moneys payable by the association under policies of insurance.

The appeal was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ. A., and FERGUSON, J., on the 22nd and 23rd January, 1900.

Riddell, Q. C., for the appellants. The widow of the deceased asserts that by the law of Quebec, she having married the insured whilst both were domiciled in Quebec, without any marriage contract, there was community of property, and she is entitled to one-half of her husband's estate, no matter where the property is situated. She sues in Quebec for \$3,000, and the executors sue in Manitoba for \$6,000. Rule 1103 (a) provides for a case of this kind;

the appellants are "sued" within the meaning of it. Rule 162 (3) permits service of interpleader proceedings out of the jurisdiction. Before the Judicature Act, proceedings could have been had under the Chancery practice: *McElheran v. London Masonic Mutual Benefit Association* (1885), 11 P. R. 181. This is a proper case for interpleader: *Re Bajus* (1893-4), 24 O. R. 397; Ontario Judicature Act, R. S. O. ch. 51, sec. 58, sub-sec. 6; *Credits Gerundeuse v. Van Weede* (1884), 12 Q. B. D. 171; *Re Benfield and Stevens* (1896-7), 17 P. R. 300, 339. There is no Rule in England allowing service of interpleader proceedings out of the jurisdiction: *In re Busfield* (1886), 32 Ch. D. 123. A demand for payment by two claimants is sufficient to support the application: *Jones v. Farrell* (1857), 1 DeG. & J. 208; *Newhall v. Kastens* (1873), 70 Ill. 156; Storey's Eq. Jur., sec. 808.

Russell Snow, on the same side. Under Rule 163, the applicant for leave to give notice of any proceeding out of Ontario must shew a right to the relief claimed. The appellants shewed that all the contracts but one were made in Ontario, and that the place of performance is in Ontario: *Parken v. Royal Exchange Assurance Co.* (1846), 8 Sess. Cas. (Scot.) 363; *Clarke v. Union Fire Ins. Co.* (1883), 10 P. R. 313; *S. C.* (1884), 6 O. R. 223. The breach is in Ontario, as the demand must be made at the head office: *Equitable Life Ins. Co. of the United States v. Perrault* (1882), 26 L. C. Jur. 382; *Reynolds v. Coleman* (1887), 36 Ch. D. 453. These three essentials give primary jurisdiction in international law to our Courts, and the judgment will be binding: see Storey on Conflict of Laws, Redfield's ed., sec. 313 *et seq.* Our Courts can only bar the claimant's right to the fund as against the applicant: Rule 1108. A judgment barring a claim is conclusive everywhere: Wharton on Conflict of Laws, 2nd ed., sec. 664.

Maclaren, Q.C., for the respondent Sarah Elizabeth Langridge. The appellants are not sued here, nor do they expect to be: Cababé on Interpleader, 2nd ed., pp. 3 and 4. The

appellants by appearing in the Quebec action submitted to the jurisdiction. By the law of Quebec a judgment of the Courts of Ontario will not bind. (He referred also to the cases cited by him before the Court below: see *ante* pp. 19 and 20.)

Judgment was delivered on the 25th January, 1900.

OSLER, J. A.—I am of opinion that the judgment of the learned Chief Justice of the Common Pleas should be restored and the order of the Master in Chambers allowing service of the notice of motion for an interpleader order on the claimants in Quebec and Manitoba affirmed.

The proceedings which have been taken against the association in those Provinces by the respective claimants there are in respect of the same policies of insurance which were issued by the association here and payable here where also the association's head office is.

In form the appeal is concerned only with the question whether the Master in Chambers was right in allowing the service of the notice of motion, but the argument necessarily involved the wider question whether an interpleader would lie at all in the circumstances, that is to say, where the claimants reside out of the jurisdiction, and are suing the stake-holder in the Courts of their own Provinces. Needless to say, that no Court in this Province presumes to make any order directed to the Courts of another Province, and if the litigants are not resident here our Courts are not in a position to exercise any jurisdiction over them *in personam*. Nevertheless, I think the case one which comes within the terms of the Con. Rule 1103 (a), which provides that relief by way of interpleader may be granted where the person seeking relief is under liability for any debt for or in respect of which he is, or expects to be, sued by two or more persons making adverse claim thereto. Here, there is a debt in respect of an Ontario contract in respect of which adverse claims are being made, and the debtors are in fact being sued, though in other jur-

isdictions. I am not prepared to say that the Rule ought to be construed as if it read "for which he is sued *in Ontario*:" it is not necessary to decide that. Assuming that what is intended by the Rule is the case of proceedings brought or expected to be brought in this Province, I think the association are entitled to say—residents as they are within this jurisdiction, which is the home of their policies—that they expect to be sued here, inasmuch as it is by proceedings in the Courts of this Province that judgments obtained against them elsewhere will probably be enforced. Proceedings of that kind may, at all events, reasonably be anticipated by the association, and it is but right that they should have an opportunity of preventing them and of avoiding the trouble and expense of defending the actions in the foreign jurisdictions by inducing, if they can, the rival claimants to litigate their claims in one proceeding in our own Courts, in which, we may say without presumption, they ought to be decided.

Then, are there any means provided by the Rules for giving notice of their application to the foreign claimants? Rule 162 (3) covers the case. "Service out of Ontario of a * * notice of motion * * in interpleader proceedings may be allowed by the Court or a Judge." The words relating to interpleader are not found in the corresponding English Rule, and would appear to have been introduced by the Rules commission when the present Rules, which came into force in September, 1897, were settled and consolidated. Whether the right to give notice to the foreign claimants depends upon this clause or not, we need not say, but finding it in the Rule, which has the force of a statute, there appears no difficulty in applying former decisions on the subject in which the fact of the claimants being foreigners out of the jurisdiction has been held not to be a bar to the granting relief: *Stevenson v. Anderson* (1814), 2 Ves. & B. 407; *Martinius v. Helmuth* (1815), G. Cooper 245; *East and West India Dock Co. v. Littledale* (1848), 7 Hare 57; *Credits Gerundeuse v. Van Weede* (1884), 12 Q. B. D. 171; *Attenborough v. St. Katharine's Dock*

Co. (1878), 3 C. P. D. 450, 454. The Court did not by doing so assert jurisdiction over the foreign claimants or propose to compel them to submit to its process. All that was done was to permit notice to be given to them of the proceedings which were being taken. If the claimants came in and submitted to the jurisdiction, their respective rights were determined as between themselves. If either of them declined to do so, his right against the plaintiff was barred, and his opponent who submitted to the jurisdiction became entitled to the subject of the dispute, or the plaintiff would be discharged by paying it into Court from further litigation by either party in our Courts.

As is said by Lord Eldon in *Stevenson v. Anderson*, 2 Ves. & B. at p. 411: "The plaintiff is bound to bring all persons into the field to contend together. That rests upon him. * * The plaintiff in a bill of interpleader against persons within and without the jurisdiction is bound to bring them all within the jurisdiction in a reasonable time; if he does not, the consequence is, that the only person within the jurisdiction must have that which is represented to be the subject of competition; and the plaintiff must be indemnified against those who are out of the jurisdiction when they think proper to come within it, and sue either at law or in this Court. If the plaintiff can shew that he has used all diligence to bring persons out of the jurisdiction to contend with those who are within it, and they will not come, the Court upon that default, and their so abstaining from giving him the opportunity of relieving himself, would, if they afterwards came here and brought an action, order service on their attorney to be good service, and enjoin that action for ever; not permitting those who refused the plaintiff that justice to commit that injustice against him."

I do not find that *Credits Gerundeuse v. Van Weede*, 12 Q. B. D. 171, has anywhere been disapproved of, although the Court has refused to carry it further by ordering service abroad of notice of motion for an originating summons or for a receiver: *In re Busfield—Whaley*

v. *Busfield* (1886), 32 Ch. D. 123 ; *Weldon v. Gounod* (1885), 15 Q. B. D. 622. The new Rule removes any difficulty which may ever be thought to have existed on this score.

In the case at bar the Manitoba claimants are ready to come in and submit to the jurisdiction of the Court. The Quebec claimants alone moved against the order allowing service. They cannot, of course, be compelled to appear, or prevented from pursuing any remedy which may be open to them in the Courts of that Province. If the association have property there exigible to execution under any judgment which may be obtained there against them, they may find themselves in an unfortunate position, though we cannot but suppose that the Quebec Courts will be able to prevent any real injustice from being done. All that we can do at present is to place those claimants in such a situation that if they decline to prosecute their asserted claim in a proceeding in which the rights of all parties may be determined, and the association protected from being made to pay their debt twice over, they shall not hereafter be permitted to resort to our Courts for that purpose.

I had written thus far when I observed the case *Re Benfield and Stevens* (1897), 17 P. R. 339, a decision of my learned brother Street. It is only necessary to observe that the present Rule as to service out of the jurisdiction was not then in force, and that the debt there in question was not a Canadian but an American debt, which must be taken to be situate in the United States, as it arose upon a deed made there between two citizens of that country, and was payable there.

The appeal should therefore be allowed.

MACLENNAN, J. A.—I am entirely of the same opinion, and for the same reasons. Here is a company who owe a debt ; they admit that they owe the debt ; and a number of claimants spring up, all saying that they are entitled either to the whole or part of it. I think it would be a great defect in our jurisprudence if the Courts

could not protect a person or company in such a position, and I am of opinion that our jurisprudence does afford protection in such a case. Suppose the case of the administration of a deceased person's estate. The estate is all here; it may consist of debts; there may be creditors; there may be legatees and other claimants; and our jurisprudence enables such an estate as that to be administered, and enables the Court to adjust the rights and claims of all persons, no matter where they reside. No matter in what country they reside, those persons will all be notified, and have an opportunity of coming in and having their rights adjusted. If they do not choose to come in, the Court will bar their rights as far as the jurisdiction of the Court extends. If parties residing abroad choose to say, "we will not come in, we will resort to the Courts of our own country," if they can get anything there, they are entitled to it. It may be that a part of the estate of the deceased is in a foreign country. In that case they might be able to resort to the assets which were there, and international law provides that the assets of a deceased person in a foreign country may not be allowed to go out of that country without satisfying the claims of the citizens of that country; and so they may be justified in abstaining from coming here in order to have their rights adjudicated upon, and to have their remedies.

So it is in the case we have before us. There is a chose in action; it is in this country; and there are a great many claimants; and our practice and our Rules enable the debtor to call upon all those who have claims, no matter where they reside, to come here, if they will, and submit to the jurisdiction of the Court and to have their rights and their remedies; but, if they do not choose to come, they may rely upon the jurisprudence of their own country, and the practice of their own Courts, to afford them such remedies as they may think themselves entitled to. If the law of the foreign country is such that what is done here is not binding upon the residents in

that country, we cannot help that, but we must administer the jurisprudence of our own country as we find it; and I am clearly of the opinion that in this case the Confederation Life Association have a right to call upon this lady, the respondent, domiciled as she is in the Province of Quebec and residing there, to come here and to submit to the jurisdiction of this Court upon her rights, whatever they may be. Of course, it is for her to determine whether she will come here, or whether she will depend upon the law of her own country to afford her the rights she seems to claim.

Another case would be the case of a trustee, who might have large funds in his hands, and the persons entitled to these funds might be in different jurisdictions. It would be a terrible hardship if he could not have his obligations as a trustee determined finally and have his discharge in the country of his domicil and where the trust property happens to be. I am surprised to find, if it be so, that the law of Quebec is such as Mr. Maclaren told us it was.

MOSS, J. A.—I am of the same opinion, and, substantially, for the same reasons as my brother Osler. I think the circumstances of the case bring it within the terms of Rule 162 (3), which permits the Court to allow service out of the jurisdiction of notice of motion for an interpleader proceeding. All that is necessary to give occasion for the exercise of that power seems to me to occur in this case. I think the judgment of Chief Justice Meredith should be restored.

FERGUSON, J.—I think the case of the appellants falls under the provisions of Rule 1103. Then Rule 162 (3) is general and clear as to service out of Ontario in interpleader proceedings. It in words authorizes such service. The objection that I once thought of great moment, namely, the want of power to enjoin or control actions or suits by claimants in foreign countries, seems to me to fade away in the light of the case of *Stevenson v.*

Anderson, 2 Ves. & B. 407. The Lord Chancellor points out, at p. 411, the manner in which the matter will work out in case the claimants in a foreign country do not choose to come in and contest their rights in the interpleader proceedings here. There seems to be the right to have the service of the notice allowed. I think the judgment appealed from should be reversed.

LISTER, J. A., concurred.

COYLE V. COYLE.

Summary Judgment—Rule 616—Dismissal of Action—Admissions on Examination for Discovery—Disclosing Case.

The Court or a Judge has power, in a proper case, to dismiss the action on an application under Rule 616.

In an action to recover a debt alleged to have been due by the defendant to the plaintiff's deceased father, the claim for which was assigned to the plaintiff by her mother, as administratrix of the father's estate, the plaintiff, on being examined for discovery, admitted that she had no personal knowledge on which she could succeed, but was relying upon an entry made in a book belonging to her father that he had lent the defendant money on a certain day :—

Held, that she could not be obliged to tell what evidence she was going to use nor what witnesses she meant to call ; she could have been asked if she had disclosed her whole case ; but, not having been asked that, it was open for her to say that she had evidence of facts outside of those within her own knowledge which might tend to establish her case ; and the action should not be dismissed.

[December 27, 1899.—*Falconbridge*, J.]

AN appeal by the plaintiff from an order of the local Judge at Belleville made under Rule 616.

The action was brought by Blanche Coyle against her uncle, Daniel Coyle, to recover \$1,000 and interest.

The statement of claim alleged that on the 14th January, 1895, the plaintiff's father lent \$1,000 to the defendant, which sum had never been paid back by the defendant ; that since making the loan the plaintiff's father had died ;

and that the plaintiff was the lawful owner of "said claim," and was such prior to the commencement of this action.

The defence was a denial that any sum was lent to the defendant at any time by the plaintiff or her father.

The plaintiff was examined for discovery, and upon her examination produced a book, kept by her deceased father, in which was the following entry :

1895.

Jan. 14. Lent to Dan Coyle \$1,000.

The plaintiff was asked what she knew about the claim she was making, and said she knew it was found in this book. Asked if that was all she knew about it, she said she knew more about ; she knew that her father had \$1,000 to pay off his mortgage and to buy a lot, and this money disappeared. She never heard her father say that he lent it to anybody, but heard him say he lost a good deal with the defendant, and that was just a short time before he died. She produced an assignment to herself from her mother, as administratrix, of the claim for \$1,000 against the defendant, dated before the commencement of the action. She said her mother had taken out administration of her father's estate. She admitted that she gave no consideration for the assignment ; she said her mother wanted her to have something out of the estate.

On the application of the defendant, an order was made by the local Judge at Belleville in Court, under Rule 616,* upon the plaintiff's admissions in her examination, dismissing the action with costs.

* 616.—(1) A party may, at any stage of an action, apply to the Court or a Judge for such order as he may, upon any admission of fact in the pleadings, or in the examination of any other party, be entitled to ; and it shall not be necessary to wait for the determination of any other question between the parties ; or he may so apply where the only evidence consists of documents * * .

(2) The foregoing Rules shall not apply to such applications, and any such application may be made by motion as soon as the right of the party applying to the relief claimed has appeared from the pleadings.

(3) The Court or a Judge may, upon any such application, give such relief, subject to such terms, if any, as such Court or Judge may think fit.

From that order the plaintiff appealed, and her appeal was heard in the Weekly Court, on the 21st December, 1899, before FALCONBRIDGE, J.

O'Rourke, for the plaintiff. It may be true that the local Judge made his order sitting in Court, but he had no power to try the action. Even if he had, great care should be taken not to take away from the plaintiff the right to have it tried on *vivâ voce* evidence, and, in any event, there was no admission made by her going to the root of the whole action: *Cook v. Lemieux* (1885), 10 P. R. 577; Con. Rules 616, 617; Holmsted & Langton's Jud. Act, 2nd ed., pp. 625, 626, 771.

Mikel, for the defendant. The local Judge sat in Court; no objection was taken to his jurisdiction, and his order was properly made there disposing of the whole action, and so giving total relief, and his discretion is not open to review. The plaintiff's admission is equivalent to saying she has no evidence to support her claim: *Pascoe v. Richards* (1881), 50 L. J. Ch. 337; *Rogers v. Wilson* (1887), 12 P. R. 322; *Mellor v. Sidebottom* (1877), 5 Ch. D. 342; Holmsted & Langton's Jud. Act, 2nd ed., p. 772; Con. Rule 45. She herself knows of no cause of action, and therefore her action must be dismissed unless she indicates the nature of the evidence upon which she relies to shew a cause of action.

Judgment was delivered on the 27th December, 1899.

FALCONBRIDGE, J.—In *Pascoe v. Richards* (1881), 50 L. J. Ch. 337, the Master of the Rolls held that the "relief" sought by a defendant under Order 40, Rule 11, of 1875 (practically the same as our Con. Rule 616, so far as this point is concerned), might go the whole length of "relieving" him wholly or partially from the action.

The Court or a Judge has, therefore, jurisdiction in a proper case to dismiss the action on an application under this Rule.

But are the admissions made by the plaintiff on her

examination for discovery sufficient to justify the dismissal of her action ?

She was asked, Q. 2, "What do you know about this claim of \$1,000 that you are making against the defendant?" A. "I know it was found in this book."

Q. 3. "That is all you know about it?" A. "I know more about it?"

Q. 4. "What?" A. "I know that my father had \$1,000 to pay off his mortgage, and to buy, etc. * * *."

She was not pressed more specifically as to whether there were any facts on which she could rely to establish her case, beyond those as to which she was questioned.

She would not be obliged to tell what evidence she was going to use nor what witnesses she meant to call, but she could have been asked if she had disclosed her whole case : *Bray on Discovery*, p. 445 *et seq.*

If she had been so asked and had answered in the affirmative, no doubt the dismissal of the action would be right.

But it is still open for her to say that she has evidence of facts outside of those within her own knowledge which may tend to establish her case.

The appeal must be allowed. Costs here and below to be costs to the plaintiff in any event.

STANLEY V. LITT.

Interlocutory Judgment—Assessment of Damages—Slander—Rule 578.

The action was commenced by writ of summons indorsed, "The plaintiff's claim is for damages for slander." No appearance having been entered, the plaintiff signed interlocutory judgment against the defendant according to form 146, and set the cause down for assessment of damages at a sittings of the High Court :—

Held, that there being nothing to shew that the action was brought under sec. 5 of the Act respecting Libel and Slander, R. S. O. ch. 68, it must be treated as an ordinary action of slander ; Rule 578 therefore applied to the case ; the delivery of a statement of claim was unnecessary ; and the plaintiff had the right to sign interlocutory judgment and have the damages assessed as she proposed.

Origin of Rule 578.

[January 29, 1900.—*Divisional Court.*]

THIS was an action brought by Emily Stanley against Catharine Litt for damages for slander.

No information other than this was obtainable from the writ of summons.

The defendant not having appeared, the plaintiff, upon due proof of service, signed interlocutory judgment and set the action down for assessment of damages, and gave the defendant notice thereof.

The defendant moved to strike the case out of the list upon an affidavit stating that she was never served with a statement of claim, nor any paper giving the statements supposed to have been made detrimental to the plaintiff's character, nor the names of the persons to whom any statements were made, and that she had never at any time made any such statement.

The Judge presiding at the sittings of the High Court for which the action was set down made an order striking it out of the list, from which the plaintiff appealed.

The appeal was heard by a Divisional Court composed of ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., on the 25th January, 1900.

R. S. Robertson, for the plaintiff, referred to Rule 578 ; *Odgers on Libel and Slander*, 3rd ed., p. 537 ; *Stuart v.*

McVicar (1898), 18 P. R. 250 ; *Macdonald v. Antelme Patterson & Co.*, W. N. 1884, p. 72 ; *William Radam's Microbe Killer Co. v. Leather*, [1892] 1 Q. B. 85 ; *Huffman v. Doner* (1888), 12 P. R. 492 ; *Star Life Assurance Society v. Southgate* (1898), 18 P. R. 151, 155.

R. T. Harding, for the defendant, relied on *Stuart v. McVicar* (1898), 18 P. R. 250 ; *Holmsted & Langton's Jud. Act*, 2nd ed., p. 727 *et seq.*

Robertson, in reply, cited *The "Orwell"* (1888), 13 P. D. 80.

The judgment of the Court was delivered on the 29th January, 1900, by

ARMOUR, C. J.—This action was commenced by writ of summons indorsed as follows:—"The plaintiff's claim is for damages for slander."

This writ was duly served upon the defendant, who failed to appear within the time limited therefor, and thereupon the plaintiff signed interlocutory judgment against the defendant according to form No. 146, and set the cause down for assessment of damages at a sittings of the High Court, and gave the defendant notice of assessment of damages thereat, at which sittings the learned presiding Judge, on the application of the defendant, struck this cause out of the list of causes set down for the assessment of damages therein, on the ground, as we are told, that Rule 578 did not apply to this action, and that therefore the cause was irregularly set down for assessment of damages therein.

Rule 578 provides that "where the writ is not specially indorsed but as indorsed includes a claim for the detention of goods and pecuniary damages, or either of them, and any defendant fails to appear, a statement of claim including any such claim need not be delivered to such defendant, but interlocutory judgment may be signed against such defendant, without prejudice to the right of the plaintiff to proceed against any other defendants, and

as to any other claims indorsed; and the value of the goods and the damages, or either of them, as the case may be, in respect of the causes of action stated in the indorsement on the writ, may, unless otherwise ordered by the Court or a Judge, be assessed, as against such defendant, at a sittings of the High Court, and either before or at the same time as the trial of the action, or issue therein, against the other defendants, if any, or at the County Court of the county in which the action is brought."

The writ in this case was not specially indorsed, but as indorsed included a claim for pecuniary damages, and the case, therefore, fell within the express words of the Rule, and the defendant having failed to appear, the delivery of a statement of claim to the defendant was unnecessary, and the plaintiff had the right to sign interlocutory judgment against the defendant as she did, according to form No. 146, and to have the damages assessed as she proposed.

The origin of Rule 578 is Rule 75 of the Ontario Judicature Act, 1881, 44 Vict. ch. 5: see Maclellan's Judicature Act, 2nd ed., p. 208: which Rule 75 was taken from Order 13, Rule 6, of the English Judicature Act of 1875, 38 & 39 Vict. ch. 77: see Wilson's Judicature Acts, 1st ed., p. 187.

The appeal must, therefore, be allowed, and the order of the learned Judge set aside.

We are dealing with the question raised before us as if this were an ordinary action for slander, for there is nothing before us to shew that the action is brought under R. S. O. ch. 68, sec. 5, and we are, therefore, not determining whether, if the action is so brought, the provisions of Rule 578 may or may not be affected by the provisions of that Act.

The costs here and below will be reserved until after the determination of the action.

COLE V. CANADIAN PACIFIC R. W. CO.

Evidence—Discovery—Negligence—Absence of Safeguards—Subsequent Placing.

Where an injury is alleged to have been caused by the negligence of the defendant in not furnishing proper safeguards at some place of danger, evidence of safeguards placed there by him after the injury is not admissible for the purpose of shewing his prior negligence; and upon an examination for discovery the defendant is justified in declining under advice to answer questions relating to such subsequent placing.

[February 16, 1900.—*Ferguson, J.*]

THIS was an action brought by Sophia Cole, as administratrix of the estate of John Cole, who was drowned by falling off the defendants' wharf at night, while leaving the defendants' freight shed, where he was employed as a porter by them. The statement of claim alleged, *inter alia*, that the defendants had been guilty of negligence in not furnishing proper lights at the point where the accident happened. The defendants having pleaded "not guilty" by statute, the plaintiff examined one S. H. Milling, an officer of the defendants, and foreman of the gang who were at work when Cole was drowned. On his examination the following questions were asked, which Milling, on the advice of counsel, refused to answer:

Q. Since then the lights have been placed along the dock at intervals?

Q. Do you know by whose order the lights that are there at present were placed there?

Q. Did you have anything to do with placing the lights in their present position?

Q. Was it by your advice that they were placed there after this accident happened?

The examination being adjourned, the plaintiff moved before the local Judge of the High Court at Owen Sound for an order requiring Milling to attend for examination, at his own expense, and answer these questions. The local Judge made the order as asked.

The defendants appealed, and their appeal was heard on the 16th February, 1900, by FERGUSON, J., in Chambers.

Shirley Denison, for the defendants, contended that changes made in the defendants' premises subsequent to the accident were not evidence, and could not be inquired into on an examination for discovery: *Hart v. Lancashire and Yorkshire R. W. Co.* (1869), 21 L. T. N. S. 261; *Nalley v. Hartford Carpet Co.* (1884), 51 Conn. 524.

D. L. McCarthy, for the plaintiff, contended that such changes could be shewn in evidence, but even if otherwise, they were matters that might be a proper subject for inquiry on an examination for discovery.

Denison was not called upon in reply.

FERGUSON, J.—The whole contention seems to me to be of an academic character only. I think, however, that each and every one of the above four questions is in regard to matters immaterial and irrelevant, and that the witness was justified in declining, under advice, to answer them.

I am, therefore, of opinion that the order appealed from cannot be sustained. Costs will be costs in the cause to the defendants.

UNION BANK OF CANADA V. RIDEAU LUMBER CO.

Appeal—Abandonment—Reinstatement—Grounds for Leave to Appeal—Judgment—Error—Injustice.

The defendants, after setting down an appeal for hearing by a Divisional Court, served notice abandoning it, and the case was struck out of the list. They afterwards moved to have it restored to the list :—

Held, that if the motion could be treated as one for leave to appeal notwithstanding the lapse of time, it would be incumbent upon the applicants to shew that *prima facie* the judgment below was wrong ; and there being no error apparent on the face of the judgment, and no specific error having been pointed out, such an application must be refused.

But, *semble*, the motion could not be so treated.

The judgment below found that the defendants were trespassers and directed a reference as to damages. When the appeal was abandoned the defendants thought the claim of the plaintiffs would be much smaller than it subsequently appeared to be ; and on learning the size of the claim, the defendants wished to renew their appeal :—

Held, no ground for interfering.

[March 1, 1900.—*Divisional Court.*]

THIS was an application by the defendants for an order restoring to the list of cases set down for hearing by a Divisional Court the defendants' appeal from the judgment of STREET, J., finding the defendants guilty of trespass and directing a reference as to damages, or for leave to set down an appeal after the time for doing so in the regular course had expired, the appeal having been struck out of the list because notice of abandonment was served by the defendants.

The motion was heard by a Divisional Court composed of MEREDITH, C.J., ROSE and MACMAHON, JJ., on the 27th February, 1900.

Aylesworth, Q. C., for the defendants.

W. M. Douglas, Q. C., for the plaintiffs.

On the 1st March, 1900, the judgment of the Court was delivered by

ROSE, J.—This was an application for leave to reinstate an abandoned appeal, the abandonment having been inten-

tional and formal, notice of abandonment having been served on the 15th December, 1899.

Even if we could treat this as a motion simply for leave to appeal notwithstanding the lapse of time, I think the application must fail. It would be incumbent upon the appellant in such a case to shew that *primâ facie* the judgment was wrong. The affidavits filed do not suggest any error in the judgment, other than as appears in the 9th paragraph of Mr. Powell's affidavit, where he states: "I am advised by counsel and believe that the defendant company has a good defence to this action upon the merits, and that there is every probability that the judgment of the learned trial Judge will be reversed upon appeal."

That judgment is before us as an exhibit, but no error was pointed out. It is simply a finding, upon construction of documents and other evidence, that the timber in question was cut without any authority from the plaintiff, and therefore that the defendant was a trespasser. Upon reading the judgment only, there does not appear to me to be any error upon the face of it, and no specific error having been pointed out, I think the application must fail upon that ground.

I do not, however, wish to be understood as saying that this application can be viewed as one simply for leave to appeal after the expiration of the time provided for by the practice. Here was a deliberate act by the defendant abandoning the appeal and agreeing to go on with the reference.

It appears from the judgment of the learned trial Judge that before going to trial the parties agreed that in the event of judgment for the plaintiff there should be a reference, and while for a time there was the intention to appeal, there was a change of intention, and the appeal was deliberately abandoned.

The only ground suggested upon which the Court is asked to interfere is that when the appeal was abandoned the defendant thought that the claim of the plaintiff

would be much smaller than it subsequently appeared to be, and that when the size of the plaintiff's claim was made to appear, the defendant wished then to contest the validity of the judgment.

If it had been made to appear to us that there was grave doubt as to whether the defendant company was a trespasser, I can understand the other ground being urged with it; but assuming that the defendant company was a trespasser, the amount of damages claimed by the plaintiff of course could not affect the probability of success upon an appeal. If the plaintiff's claim is well founded, the size of it cannot affect the question. If it is an excessive claim, and as to such excess not founded upon fact or law, that can be made to appear in the Master's office. If the Master should proceed upon any erroneous principle, which we cannot assume, that error can be corrected upon appeal. The defendant cannot ask that the Court should permit an appeal merely to give directions to the Master on the assumption that without such directions the Master may go wrong. The presumption is that the Master will decide upon the facts in accordance with the law.

The learned trial Judge apparently has decided but one question, namely, that the defendant company was a trespasser, and has left the quantum of damage to be ascertained upon principles of law applicable to such ascertainment, without giving any specific direction. I cannot find any mistake which would justify the Court in interfering, and think that the application must be dismissed with costs.

Since writing the above, I have examined the cases of *In re Ambrose Lake Tin and Copper Company* (1878), 8 Ch. D. 643, *Watson v. Cave* (1881), 17 Ch. D. 23, and *In re Manchester Economic Building Society* (1883), 24 Ch. D. 488, to which we have been referred by Mr. Aylesworth since the argument, but they do not, in my opinion, assist the defendant. I think I must exercise the caution suggested by Bowen, L. J., in the last of the cases above

referred to, and avoid any definition further than to say that the defendant company has not made out any case, on the facts before us, shewing that any injustice is likely to arise if it be not allowed to appeal, or that it is only asking for what is just.

PICKARD V. TIMS.

Costs—Scale of—County Court—Defence Arising after Action—Discharge of Part of Claim—Division Court Garnishment—Payment into Court.

On the 5th of August, 1899, a creditor of the plaintiff issued a summons out of a Division Court claiming \$64 from the plaintiff and claiming to attach moneys in the hands of the defendant, as garnishee, to answer the plaintiff's debt, and served it on both primary debtor and garnishee on the day of its issue. On the 17th August this action was brought in a County Court to recover \$133.40. On the 28th August the garnishee (the defendant in this action) paid \$57.50 into the Division Court. On the 6th September judgment was given in the Division Court for the primary creditor (the plaintiff in this action) for \$64 and against the garnishee for \$57.50. On the 5th October the plaintiff delivered his statement of claim for the whole \$133.40 :—

Held, that the service of the summons was no bar to this action; that the defence that the defendant was discharged as to \$57.50 by his payment into the Division Court was a defence which did not arise until the payment was made and judgment given in the Division Court, and was consequently a defence arising after action brought; and such payment and judgment could not have relation back to the time of the service of the summons; and therefore, it having been adjudged in this action that the plaintiff was entitled to the amount claimed by him, less the \$57.50, the action was properly brought in a County Court, and the plaintiff was entitled to costs on the scale of that Court.

[March 13, 1900.—*Divisional Court.*]

AN appeal by the plaintiff from the judgment of the Judge of the County Court of Oxford at the trial of an action in that Court, in so far as it refused the plaintiff costs on the scale of the County Courts and directed a set-off of costs in favour of the defendant under Con. Rule 1132.

On the 5th August, 1899, one Robert Stuart, primary creditor, issued a summons out of a Division Court against Elias Pickard (the plaintiff in this action), primary debtor,

and Thomas Tims (the defendant in this action), garnishee, by which the primary debtor was summoned to appear to answer for a claim of \$64 and costs, and by which the garnishee was required to appear and state whether he owed any and what debt to the primary debtor, and why he should not pay the same into Court to the extent of the primary creditor's claim in satisfaction thereof, which summons contained a warning to the garnishee that from and after the service all debts due or accruing due from him to the primary debtor were attached, and if he paid the same to any one other than the person holding the proper order to receive it or into Court, he would be liable to repay it in case the Court or Judge should so order.

The summons was duly served on the primary debtor and on the garnishee on the 5th August, 1899.

On the 17th August, 1899, this action was brought to recover \$133.40, a balance alleged to be due to the plaintiff from the defendant under a contract.

On the 28th August, 1899, the garnishee (the defendant in this action) paid \$57.50 into the Division Court; and on the 6th September, 1899, it was adjudged by the Division Court that the primary debtor (the plaintiff in this action) was indebted to the primary creditor in \$64, to be paid in ten days; that the garnishee was indebted to the primary debtor in \$57.55; and that the primary creditor should recover against the garnishee \$57.55 in ten days.

On the 5th October, 1899, the plaintiff delivered his statement of claim, claiming \$133.40.

By his statement of defence the defendant denied the plaintiff's allegations, and alleged a mutual agreement for the removal of the barn (for payment for which the plaintiff claimed) and for all the carpenter work and other work in connection therewith, for \$100; and that he had fully satisfied that sum and all claims for extras by payments, which he specified, including the \$57.50 paid into the Division Court.

The cause was tried by the Judge of the County Court and a jury, who found in favour of the plaintiff's claim for \$133.40.

The Judge thereupon gave judgment for the plaintiff for \$75.90, being the \$133.40 found by the jury, less \$57.50 paid into the Division Court, with costs on the scale of the Division Courts, and with a set-off of costs in favour of the defendant as provided by Con. Rule 1132.

The plaintiff appealed from the judgment as to costs, and his appeal was heard by a Divisional Court composed of ARMOUR, C.J., and STREET, J., on the 9th March, 1900.

Jackson, Q.C., for the plaintiff.

Shepley, Q.C., for the defendant.

On the 13th March, 1900, the judgment of the Court was delivered by

ARMOUR, C. J.—The summons issued out of the Division Court, upon service thereof upon the garnishee (the defendant herein), had the effect of attaching and binding in his hands the debt sought to be garnished from the time of the service until a final decision was made on the hearing of the summons: Division Courts Act, R. S. O. ch. 60, sec. 194. And judgment having been given for the primary creditor against the garnishee (the defendant herein), the debt garnished continued bound in the hands of the garnishee (the defendant herein) to satisfy the claim of the primary creditor, and payment by the garnishee (the defendant herein) to the extent of the claim into Court was to that extent a discharge to the garnishee (the defendant herein) as between him and the primary debtor (the plaintiff herein): Division Courts Act, sec. 195.

The \$57.50 was paid into Court by the defendant on the 28th August, 1899, but it was not until judgment was given in the Division Court on the 6th September, 1899, against the defendant for that amount, that the said sum so paid into Court became a discharge *pro tanto* to the defendant as between him and the plaintiff.

The service of the summons out of the Division Court

upon the defendant on the 5th August, 1899, was no bar, and could not be pleaded as such, to this action, which was brought on the 17th August, 1899: *McGinnis v. Village of Yorkville* (1861), 21 U. C. R. 163; *Sykes v. Brockville and Ottawa R. W. Co.* (1863), 22 U. C. R. 459.

This action could not have been brought in the Division Court, and was properly brought in the County Court; and the defence that the defendant was, as between him and the plaintiff, discharged as to the said sum of \$57.50 by his paying the sum into the Division Court, in pursuance of the judgment of that Court, was a defence which did not arise until the said payment and judgment, and was consequently a defence arising after action brought; and such payment and judgment could not have relation back to the time of the service of the summons out of the Division Court so as to be pleaded in bar of the action as to the said sum of \$57.50, as if paid and adjudged before the commencement of this action; but could only be pleaded to this action as a defence as to this sum arising after the commencement of this action.

Such a payment so made could have no different effect upon the costs of the action than any other defence arising after the commencement of the action.

The result, therefore, is that this action having been properly brought in the County Court, the plaintiff was entitled to his costs upon the County Court scale.

And, as the question is one of principle, and not of discretion, the appeal must be allowed with costs and judgment entered in the Court below for \$75.90 with County Court costs.

ANGLO-CANADIAN MUSIC PUBLISHING ASSOCIATION V.
SOMERVILLE.*Costs—Infringement of Copyright—Consent Judgment—Damages—
Amount of—Reference—Offer—Payment into Court.*

Where judgment was pronounced by consent declaring that the defendant had infringed the plaintiffs' copyright, restraining him from continuing to infringe, and directing a reference to ascertain the damages sustained by reason of the infringement, and the Master found that the damages were only \$6.70, and also reported specially that the plaintiffs were aware before action that the defendant was willing to hand over all copies of and to stop selling or giving away the publications in question, but the plaintiffs demanded \$100 compensation, and that after action the defendant offered to pay \$25 for damages and costs and to deliver up any of the publications on hand and to give an undertaking that there would be no further infringement, but the plaintiffs did not accept the offer :—

Held, that the plaintiffs were entitled to the costs of the action ; and also to the costs of the reference, the defendant not having, when consenting to judgment, offered to pay a fixed sum for damages and to pay it into Court.

[March 14, 1900.—*Armour*, C. J.]

THIS was an action for the infringement of a copyright. The plaintiffs' motion for an interim injunction was turned into a motion for judgment, and judgment was pronounced upon consent declaring that the defendant had infringed the plaintiffs' copyright, restraining him from continuing to so infringe, and referring it to the Master in Ordinary to ascertain and state what damage, if any, the plaintiffs had sustained by reason of the infringement by the defendant of the copyright, and reserving further directions and costs.

The Master found that the damage amounted to \$6.70, and reported specially as follows :—(1) That the plaintiffs were aware prior to the issue of the writ of summons in this action that the defendant was willing to hand over to the plaintiffs all copies of, and to stop selling or giving away, the songs in question, but the plaintiffs demanded an adequate compensation, which they fixed at \$100. (2) That after being served with the writ of summons the defendant offered to pay to the plaintiffs the sum of \$25 for damages and costs, and also offered to deliver up any

of the songs on hand and to give any undertaking required that there would not be any further infringement, but the plaintiffs did not accept the offer, but offered to take \$50 for damages and costs.

On the 14th March, 1900, *Laing*, for the plaintiffs moved before ARMOUR, C.J., in the Weekly Court, for judgment in favour of the plaintiffs against the defendant for the amount found due by the Master for damages and for the costs of the action.

Roaf, Q.C., for the defendant, shewed cause and contended that on the special findings of the Master the plaintiffs were not entitled to costs, or to the costs of the reference, or to the full costs of all the proceedings.

Judgment was delivered on the same day.

ARMOUR, C.J.—I think the plaintiffs are entitled to judgment for the amount found by the Master and the costs of the action and of the reference.

The costs of the action he is clearly entitled to, as the following decisions shew : *Cooper v. Whittingham* (1880), 15 Ch. D. 501 ; *Upmann v. Forester* (1883), 24 Ch. D. 231 ; *Wittman v. Oppenheim* (1884), 27 Ch. D. 260.

And, in order to protect himself as to the costs of the reference, the defendant should, when appearing on the motion for the injunction and consenting to the judgment, have offered to pay a fixed sum for damages and to pay it into Court, and upon his doing so the Court might have directed a reference upon the terms that if the Master found such sum sufficient to answer the damages the plaintiffs should pay the costs of the reference.

McCULLOCH V. TOWNSHIP OF CALEDONIA.

Costs—Scale of—Drainage Act—Reference.

Section 113 of the Drainage Act, R. S. O. ch. 226, providing that the tariff of the County Court shall be the tariff of costs under that Act, applies only to actions which ought properly to have been instituted by notice under sec. 93, and not to actions which might properly be brought notwithstanding the Drainage Act, and which are referred to the Referee under sec. 94 only because the Court thinks they may be more conveniently disposed of by him.

[January 24, 1899.—*The Court of Appeal.*]

THIS was an action for damages for injuries sustained by reason of water brought upon the plaintiff's land by the negligence of the defendants. The action was brought in the High Court, and was referred to the Drainage Referee by order of the trial Judge made at the sittings at which it had been set down for trial. The Referee tried it and made his report, which was varied by the judgment of the Court of Appeal (1898), 25 A. R. 417.

After the judgment a question arose, upon the settlement of the certificate, as to the scale upon which the costs of the action and of the reference were to be taxed, and the matter was brought before the Court.

The question was argued on the 5th December, 1898, before BURTON, C.J.O., OSLER, MACLENNAN, and MOSS, JJ.A.

J. H. Moss, for the plaintiff, contended that he ought to be allowed all costs in the Court below on the High Court scale, including the costs of the reference. He referred to *Crooks v. Township of Ellice* (1894), 16 P. R. 553.

J. B. O'Brian, for the defendants, contended that the costs of the reference ought to be allowed upon the County Court scale only, relying upon sec. 113 of the Drainage Act, R. S. O. ch. 226.* He cited *Sage v. Township of West Oxford* (1892), 22 O. R. 678.

*113. Until other provisions are made under the last two preceding sections the tariff of the County Court shall be the tariff of costs and of fees and disbursements for solicitors and officers under this Act * * *.

Judgment was delivered on the 24th January, 1899.

THE COURT held that the plaintiff was entitled to full costs of the reference upon the High Court scale, being of the opinion that sec. 113 applied only to cases which ought properly to have been instituted by notice under sec. 93† of the Drainage Act, and did not apply to actions which might properly be brought notwithstanding the Drainage Act, and which are referred to the Referee under sec. 94‡ only because the Court or a Judge thereof thinks they may be more conveniently tried before and disposed of by the Referee.

*93.—(1) In case a dispute arises * * as to damages alleged to have been done * * in the construction of drainage works * * the municipality, company, or individual complaining may refer the matter to the arbitration and award of the said Referee * *.

†94. Where an action of damages is brought and in the opinion of the Court the proper proceeding is under this Act, or the action may be more conveniently tried before and disposed of by the Referee, the Court * * may * * make an order transferring or referring it to the Referee.

MOKE V. TOWNSHIP OF OSNABRUCK.

Costs—Scale of—Drainage Act—Reference.

Where an action is brought to recover damages for injury to property by the construction of drainage works, and the claim is within the scope of sec. 93 of the Drainage Act, R. S. O. ch. 226, under which proceedings before the Drainage Referee may be taken without bringing an action, and an order is made referring the action to the Referee for trial, the costs should be taxed according to the tariff of the County Courts, under sec. 113.

[February 26, 1900.—*Armour*, C. J.]

AN appeal by the defendants from the taxation of the plaintiff's costs of an action which was referred to the Drainage Referee.

The appeal was heard by ARMOUR, C. J., in Chambers, on the 19th February, 1900.

Cattanach, for the defendants, contended that the costs should have been taxed on the scale of the County Courts under sec. 113 of the Drainage Act, R. S. O. ch. 226.

J. H. Moss, for the plaintiff, relied on the decision of the Court of Appeal in *McCulloch v. Township of Caledonia*, 24th January, 1899.*

Judgment was delivered on the 26th February, 1900.

ARMOUR, C. J.—In this action the plaintiff claimed from the defendants damages alleged to have been done to his property in the construction by the defendants of drainage works or consequent thereon, and such claim was, in my opinion, within the scope of the provisions of sub-sec. 1 of sec. 93 of the Municipal Drainage Act, R. S. O. ch. 226, and proceedings might have been taken in the manner provided by sub-secs. 2 and 3 of said section.

The plaintiff, however, brought this action, and, after issue joined, obtained an order referring it to the Referee

*Now reported *ante* p. 115.

under the Drainage Laws, who tried the same and gave judgment for the plaintiff for \$400 and costs, which costs the taxing officer taxed according to the High Court tariff, and the defendants appealed ; contending that under sec. 113 of the said Act, no other provisions having been made under secs. 111 and 112 of the said Act, the costs ought to have been taxed according to the tariff of the County Court.

In a similar case to this, *Fewster v. Township of Raleigh* (1895), 31 C. L. J. 287, 15 C. L. T. Occ. N. 137, I held that the costs ought to be taxed according to the tariff of the County Court, but I am told that in a case of *McCulloch v. Township of Caledonia* the Court of Appeal overruled this decision, but no judgment to that effect has been produced, and I cannot follow a hearsay precedent, but must adhere to my former decision until proper evidence of its having been overruled can be produced.

The appeal will, therefore, be allowed with costs.

ALLISON V. BREEN.

[TWO ACTIONS.]

Limitation of Actions—Judgment—Revivor—Time—Notice.

In 1894 the plaintiff obtained *ex parte* (the defendant being out of the jurisdiction) an order reviving a judgment for the payment of money which he had recovered against the defendant in 1875, and allowing the entry of a suggestion on the judgment roll, and the issue of execution. The plaintiff entered the suggestion in 1894, and afterwards examined the defendant as a judgment debtor, whereupon the defendant made an offer of settlement, which was not accepted. The plaintiff died in 1895 and the defendant in 1899, after which the personal representative of the plaintiff obtained an order on *præcipe* reviving the action in his name as plaintiff and in that of the personal representative of the defendant as defendant:—

Held, that the last order should have been made on notice, but it was proper to treat an application to set it aside as a substantive motion on notice, and, so treating it, the order should be confirmed.

The order made in 1894 reviving the judgment should have been made on notice, under the Common Law Procedure Act, then in force, but, under the circumstances of the defendant's absence from the country, his subsequent examination, and the attempted settlement, it was a valid and binding order.

Held, also, following *Mason v. Johnston* (1893), 20 A. R. 412, that the judgment remained in force for twenty years, and the entry of the suggestion within that time was effectual to renew the time from which the statute begins to run.

[February 22, 1900.—*The Master in Chambers.*]

[March 3, 1900.—*Street, J.*]

APPLICATIONS by Mary Wood, administratrix of the estate of the judgment debtor, deceased, for an order rescinding and setting aside the orders made on *præcipe* in these actions on the 20th January, 1900, reviving the judgments therein in the name of Andrew A. Adams, executor of the will of the judgment creditor, as plaintiff, and of Mary Wood, the applicant, as defendant, and allowing execution to issue; and also for an order setting aside certain orders made in one action in September, 1894, and in the other on the 29th January, 1895, reviving the judgments and allowing execution thereon to be issued.

The grounds of the applications were:—(1) That the orders of the 20th January, 1900, were made without notice to the applicant. (2) That there was no power to

make such orders, as the judgments were not lawfully in force, the previous orders of revivor having been made without notice to the defendant and at a time when the period for reviving had elapsed by virtue of sec. 23 of R. S. O. 1877 ch. 108.

The motion was heard by the Master in Chambers on the 16th February, 1900.

Tytler and *C. J. McCabe*, for the applicant.

J. J. Maclellan, for the plaintiff by revivor.

Judgment was delivered on the 22nd February, 1900.

THE MASTER IN CHAMBERS.—The facts appear to be as follows. On the 1st March, 1875, Henry Allison obtained a judgment against Patrick Breen in an action in the Common Pleas for costs taxed at \$119.84; and on the 9th June, 1875, the same plaintiff obtained a judgment in an action in the Queen's Bench against the same defendant for \$581.23. These sums remaining unpaid, the plaintiff obtained an *ex parte* order in the Common Pleas action on the 22nd September, 1894, reviving the judgment and allowing the entry of a suggestion on the judgment roll. The reason for the order being made *ex parte* was the absence of the defendant from the jurisdiction and the inability of the plaintiff to serve him with a notice of the application. The suggestion was entered on the 20th October, 1894, and on the 24th January, 1895, the plaintiff, having obtained a subpœna to serve on the defendant to examine him as a judgment debtor, served him with such subpœna and the examiner's appointment, and on the 30th January, 1895, the defendant, submitting himself for examination, was examined at length by the plaintiff's counsel, and on the same day a proposal for settlement was made by the defendant to the plaintiff, but this was not accepted. Nothing further appears to have been done in the action. The plaintiff died on the 29th May, 1895, leaving a will appointing Andrew A. Adams his executor,

and the latter obtained probate of the will on the 14th June, 1895, from the Surrogate Court of York. The defendant Patrick Breen died on or about the 28th August, 1899, intestate, and letters of administration were issued to his sister Mary Wood by the Surrogate Court of York, and it is alleged she has received about \$4,315.27 of his estate.

In my opinion, the orders of the 20th January, 1900, should have been made on notice; but, treating this application as a substantive motion for the issue of such an order, I have no difficulty in making the order under the circumstances. It is true that under the Common Law Procedure Act the order to revive a judgment should be made on notice to the defendant, but that Act has been done away with, and our present Rule 864* takes its place, providing a less expensive and more simple procedure. Under the circumstances of the defendant's absence from the country at the date of the order, his subsequent examination, and the attempted settlement by him, I must hold the order reviving the judgment to be valid and binding.

In the Queen's Bench case the order was made on notice to the defendant, he not appearing.

As to the question of the judgment being at an end at the expiry of ten years from its issue: while, no doubt, that was held in *Caspar v. Keachie* (1877), 41 U. C. R. 599, the later cases of *Boice v. O'Loane* (1878), 3 A. R. 167, *Allan v. McTavish* (1878), 2 A. R. 278, *Mason v. Johnston* (1893), 20 A. R. 412, and *McCullough v. Sykes* (1885),

*Rule 863. As between the original parties to a judgment, execution may issue at any time within six years from the date of the same.

864. (a) Where the six years have elapsed or any change has taken place by death or otherwise in the parties entitled or liable to execution

* * the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly, or to amend any execution already issued. And such Court or Judge may make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any way in which a question in an action may be tried.

11 P. R. 337, hold differently, and the statute of 1887, no doubt carrying out the decisions in these cases, made it perfectly clear that the limit is twenty years, and not ten years, as contended for by the applicant.

The entering of the suggestion is such a proceeding as to renew the time from which the statute begins to run.

I confirm the orders of January, 1900, moved against, but, under all the circumstances, there will be no costs.

Mary Wood appealed from this decision, and her appeal was heard by STREET, J, in Chambers, on the 2nd March, 1900, the same counsel appearing.

Judgment was delivered next day.

STREET, J.—The judgments in question, according to the law as settled by our Court of Appeal in the cases referred to in the Master's judgment, were revived in good time, that is to say, within twenty years of the time they were recovered; and the orders reviving them and allowing the judgment creditor to issue execution upon them were in accordance with the law as so settled, and it is too late now to disturb them. This was the real contest between the parties.

The learned Master, upon the applications to set aside the late orders reviving the actions, treated the matter as if it were an application upon notice to revive the judgments, giving the defendant the benefit of any reasons she could have urged upon such application. I think this was a mode of dealing with the questions involved which was quite proper, and that the conclusions at which he arrived were right.

The appeal must, therefore, be dismissed with costs.

[An appeal from this decision was heard by a Divisional Court on the 3rd April, 1900. Judgment was reserved. See *post* p. 143.]

ROMBOUGH ET AL. V. BALCH ET AL.

Appeal—Supreme Court of Canada—Security for Costs—Stay of Proceedings—Payment of Money Out of Court.

The plaintiffs recovered judgment in the High Court against the defendants for damages and costs. The defendants appealed to the Court of Appeal, paying \$200 into Court as security to the plaintiffs for the costs of such appeal, which was dismissed with costs. The defendants launched a further appeal to the Supreme Court of Canada, and gave the security required by sec. 46 of the Supreme and Exchequer Courts Act, but no other security :—

Held, that proceedings to enforce the plaintiffs' judgment in the High Court were not stayed, either by force of sec. 48 or otherwise.

But the Court was not bound to pay out immediately to the plaintiffs the sum of \$200 paid in by the defendants, the judgment of the Court of Appeal being stayed pending the appeal to the Supreme Court, which might determine that the plaintiffs were not entitled to the costs of the Court of Appeal ; and the money ought not to be paid to the plaintiffs, from whom it could never be recovered, and whose solicitors declined to take it upon the usual undertaking, but should remain in Court pending the appeal.

[February 20, 1900.—*The Master in Chambers.*]

[March 6, 1900.—*Meredith, J.*]

AN application by the plaintiffs for an order for payment out of Court to them of the sum of \$200 paid into Court by the defendants as security for the costs of their appeal to the Court of Appeal.

At the trial the plaintiffs obtained a judgment against the defendants for \$2,500 damages and costs, from which the defendants appealed to the Court of Appeal. Their appeal was dismissed with costs: 27 A.R. 32. The defendants proposed to appeal to the Supreme Court of Canada, and it was admitted for the purposes of this application that security for the costs of the proposed appeal had been given by the defendants, but no security for the amount awarded the plaintiffs at the trial nor for the costs of the action.

The following sections, or parts of sections, of the Supreme and Exchequer Courts Act, R. S. C. ch. 135, are applicable :—

46. No appeal shall be allowed until the appellant has given proper security * * that he will effectually

prosecute his appeal and pay such costs and damages as may be awarded against him by the Supreme Court.

47. Upon the perfecting of such security, execution shall be stayed in the original cause, except in the following cases:—

* * * * *

(e) If the judgment appealed from directs the payment of money, either as a debt or for damages or costs, execution thereof shall not be stayed, until the appellant has given security * * that if the judgment or any part thereof is affirmed, the appellant will pay the amount thereby directed to be paid * * and all damages awarded against the appellant on such appeal.

48. When the security has been perfected and allowed, any Judge of the Court appealed from may issue his fiat to the sheriff * * to stay the execution, and the execution shall be thereby stayed * * ; and if the Court appealed from is a Court of Appeal, and execution has been already stayed in the case, such stay of execution shall continue without any new fiat, until the decision of the appeal by the Supreme Court * * .

The motion was argued before the Master in Chambers on the 19th February, 1900.

J. H. Moss, for the plaintiffs.

W. H. Blake, for the defendants.

Judgment was delivered on the following day.

THE MASTER IN CHAMBERS.—It is contended for the defendants that as soon as security for the costs of the appeal to the Supreme Court has been given, that is a stay of the judgment appealed from, and, as the judgment appealed from, namely, the judgment of the Court of Appeal, does not direct payment of money to the plaintiffs other than the costs of the appeal, that under the Rules there is a stay.

I do not agree with the contention that “ the judgment

appealed from " is limited to the judgment of the Court of Appeal solely ; it also refers to the original judgment in the action which the Court of Appeal upheld ; that is the judgment the defendants are trying to set aside.

I am, therefore, of opinion that the giving of the security to the Supreme Court is not a stay of the original judgment, and that the plaintiffs are entitled to prosecute that judgment for the purpose of obtaining payment of the amount awarded them. I think this is borne out by the decisions of *McMaster v. Radford* (1894), 16 P. R. 20, and *Agricultural Insurance Co. v. Sargent* (1895), *ib.* 397.

The order will go for payment of the amount in Court to the plaintiffs on their judgment and costs.

The defendants appealed, and their appeal was heard by MEREDITH, J., in Chambers, on the 5th March, 1900.

The same counsel appeared.

Judgment was delivered on the following day.

MEREDITH, J.—I agree with the learned Master in his opinion that proceedings to enforce the plaintiffs' judgment in the High Court are not now stayed.

The defendants' contention is that they are stayed by virtue of sec. 48 of the Supreme Court Act.

Sections 46, 47, and 48 shew very plainly that execution of a judgment, such as this, was not to be stayed until security for debt and costs was perfected and allowed ; and the provision in sec. 48 for continuing a stay in the Court of Appeal *without a new fiat*, has reference to a stay after security given such as the Act requires, that is, in such a case as this, security for debt and costs, as well as under sec. 46. " When the security has been perfected and allowed," a fiat may be issued, by a Judge of the Court appealed from, staying execution ; but, if execution is already stayed, the stay shall continue without any new fiat.

Con. Rule 827 stayed such proceedings pending the appeal to the Court of Appeal only.

But the Court is not bound to accede to the plaintiffs' demand of the money in question, no matter what the circumstances of the case may be; and in this case ought not at present to accede to it. The money was paid into Court as security for the plaintiffs' costs of the defendants' appeal to the Court of Appeal. To-day the plaintiffs are awarded their costs of that Court, but are not entitled to the immediate payment of them, the judgment of that Court being stayed pending the appeal to the Supreme Court. To-morrow the plaintiffs may not be entitled to such costs; they may be ordered to pay the defendants' costs of the Court of Appeal; and it is asserted, and not denied, that if now paid to the plaintiffs the money can never be recovered from them, and their solicitors decline to take it upon the usual undertaking.

In these circumstances, the money ought to remain in Court during the present appeal at all events: and, as no authority against the view I have expressed upon the subject has been cited, and I know of none, the appeal will be allowed and the motion dismissed, without prejudice to its renewal under changed circumstances: and the costs of motion and appeal will abide the final result of the action; the plaintiffs will have them if their success continues, the defendants if they succeed ultimately.

SPEARS ET AL. V. FLEMING.

Summary Judgment—Rule 603—Recovery of Land—Money Claim—Counterclaim—Trial.

The defendant having entered into possession of land which he had contracted to purchase from the plaintiffs, and having, as alleged, made default in payment of instalments of the purchase money, the plaintiffs brought an action against him to recover possession of the land and also for a money demand. The writ of summons being specially indorsed, and the plaintiffs having moved for summary judgment under Rule 603, the defendant set up that he had been induced to enter into the contract, and to make the purchase of certain chattels out of which the money demand arose, by fraud and misrepresentation, for which he intended to counterclaim, and that nothing was due to the plaintiffs in respect of their money demand. The Master ordered judgment for the recovery of the land, but stayed the operation of it until after judgment upon the plaintiffs' other claim and the defendant's counterclaim, which he allowed to go to trial:—

Held, reversing this order, that many serious questions might arise at the trial as to the recovery of the land and the terms upon which it might be recovered, and the trial Judge ought not to be hampered with a final judgment for the recovery of the land in adjudicating upon the questions likely to arise upon the trial of the action.

[March 6, 1900.—*The Master in Chambers.*]

[March 12, 1900.—*Armour, C. J.*]

MOTION by the plaintiffs, under Rule 603, for summary judgment for the recovery of the possession of the land claimed in the indorsement on the writ of summons, and for \$227.15, the amount of the liquidated money demand indorsed on the writ, and costs.

The indorsement was "to recover possession of that certain piece or parcel of land" (describing it) "which land, by an agreement dated the 13th day of October, A. D. 1897, the plaintiffs agreed to sell to the defendant and the defendant agreed to purchase for the sum of \$1,885, the defendant paying \$1,000 in cash and covenanting in said agreement to pay the balance in two instalments of \$442.50 each, payable twelve months and twenty-four months respectively from the date of said defendant's taking possession of said premises, with interest as therein mentioned, and time having been expressly declared to be of the essence of such agreement, and the defendant having made default in payment of both of

such instalments, the plaintiffs now seek to recover possession of the said land and premises. And the plaintiffs also claim the sum of \$227.15"—setting out particulars of the money claim, which was for the balance of the purchase money of certain chattels, and interest thereon.

The cause of action was sworn to by one of the plaintiffs in an affidavit which also verified a copy of the agreement, and stated that in the deponent's belief there was no defence to either of the claims.

The defendant filed an affidavit in answer to the motion in which he swore that he was induced to enter into the contract for the purchase of the land referred to (hotel premises in a village) and the purchase of the chattels (hotel furniture, etc.), by the fraud and misrepresentations of one of the plaintiffs, of which he gave some particulars; that, according to the terms of the purchase of the chattels, nothing was due to the plaintiffs at the time the writ issued; that certain payments made by the defendant should have been credited upon the purchase money of the land, instead of upon the purchase money of the chattels; and that he intended to counterclaim for damages for the alleged misrepresentations.

The motion was heard by the Master in Chambers on the 5th March, 1900.

J. H. Moss, for the plaintiffs.

O. M. Arnold, for the defendant.

Judgment was delivered on the following day.

THE MASTER IN CHAMBERS.—Judgment may go for the recovery of the land, but stayed until after the disposition of the counterclaim of the defendant. It may be that the damages (if any) the defendant has suffered will be sufficient to pay the plaintiff in full for the property. The amount due on the furniture is in dispute, and the parties will have to go to trial as to that. See *Hood v. Martin*

(1882), 9 P. R. 313, as to some of the questions that might be raised in such an action. However, I think the only defence the defendant has is in the shape of a counterclaim, and that should be delivered in eight days after the plaintiffs plead as to the personal claim.

The defendant appealed from the order of the Master in so far as it awarded judgment for the recovery of the land, and the plaintiffs also appealed from the order in so far as it directed that the judgment should be stayed until after the trial of the defendant's counterclaim.

The appeal and cross-appeal were heard by ARMOUR, C. J., in Chambers, on the 12th March, 1900.

Lindsey, Q. C., for the defendant.

J. H. Moss, for the plaintiffs.

Judgment was delivered on the same day.

ARMOUR, C. J.—This is not a case in which final judgment should have been directed for the recovery of the land in question.

Many serious questions may arise at the trial of this cause as to the recovery of the land and as to the terms upon which it may be recovered: see *Cooper v. London, Chatham, and Dover R. W. Co.* (1866), 14 W. R. 985.

And I do not think that the trial Judge ought to be hampered with a final judgment for the recovery of the land in adjudicating upon the questions likely to arise upon the trial of the action.

The appeal will, therefore, be allowed with costs, and the cross-appeal disallowed with costs.

WINDSOR FAIR GROUNDS AND DRIVING PARK ASSOCIATION
V. HIGHLAND PARK CLUB.

*Parties—Third Party Notice—Agreement—Rule 209—Appearance—
Leave to Appeal.*

The plaintiffs' claim against the defendants was for the balance of a sum agreed to be paid for the hire of a race track. The defendants alleged that a ferry company had agreed with the plaintiffs to pay and contribute towards the hire of the track a certain sum for each day of the race meetings, in consideration of the increased travel, and that the defendants had thereby been induced to enter into the agreement with the plaintiffs.

Held, that this allegation was not sufficient to support a claim against the ferry company for contribution, indemnity, or any other relief over, within Rule 209; and therefore the defendants should not have been allowed to serve a third party notice.

Held, also, that the proper practice in moving against a third party notice, is to move without entering an appearance.

Leave to appeal refused.

[March 5, 1900.—*Divisional Court.*]

[March 30, 1900.—*Moss, J. A.*]

AN appeal by the Detroit, Belle Isle, and Windsor Ferry Company from an order of FERGUSON, J., in Chambers, affirming an order of a local Judge refusing to set aside a third party notice served upon the appellants by the defendants and the order allowing such service. The facts are stated in the judgment.

The appeal was heard by a Divisional Court composed of MEREDITH, C.J., ROSE and MACMAHON, JJ., on the 26th February, 1900.

Aylesworth, Q.C., for the appellants.

F. A. Anglin, for the defendants.

Judgment was delivered on the 5th March, 1900.

MACMAHON, J.—The plaintiffs' action is based on an agreement in writing, dated the 23rd January, 1899, by which the defendants agreed to hold two race meetings on the plaintiffs' track for nineteen days at each meeting, and by which the defendants agreed to pay for the use of the

track \$85 per day for the thirty-eight days. There was also a covenant by the defendants that, in default of such race meetings being held for the full period of nineteen days each, they would pay to the plaintiffs the sum of \$125 for each day upon which a race was not held.

After crediting certain payments on account, the plaintiffs claim as due them under the agreement the sum of \$2,140.

The statement of defence admits the agreement as set out in the statement of claim, but alleges that the defendants have made certain payments to the plaintiffs on account; they pay into Court \$1,160, and say that that is sufficient to satisfy the plaintiffs' claim except as to \$480, as to which they allege that before the making of the agreement, and as an inducement to the defendants to enter into the same, the plaintiffs represented to the defendants that the Detroit, Belle Isle, and Windsor Ferry Company had promised and agreed to pay and contribute towards the payment of the rent or hire of the race track and grounds the sum of \$15 per day for every day that the said race meetings should be held, in consideration of the increased travel and transportation occasioned by such race meetings, and the large profits accruing therefrom; and that the plaintiffs were to collect and receive the said contribution from the ferry company, and apply the money so received in reduction of the rent or hire, and relying on such representations the defendants were induced to enter into the said agreement with the plaintiffs; or in the alternative the defendants allege that the ferry company undertook and agreed with certain officers of the plaintiffs' association, acting on behalf of the defendants, at and before the making of the second agreement between the plaintiffs and the defendants, that the ferry company, in consideration of the increased travel and transportation between Detroit and Windsor incident to the said race meetings, would pay and contribute to the payment by the defendants of the rent or hire of the race track and grounds \$15 per day for every day on which said race meetings should be held;

and that the said undertaking of the ferry company was the main inducement for the defendants to enter into the agreement with the plaintiffs; and that the amount so to be paid and contributed amounted to \$480. And the defendants claim that the action should be dismissed with costs; or in the alternative that judgment should not be entered against them for more than \$480 and costs, and in that event that the defendants are entitled to judgment against the ferry company for said sum, and costs as between the plaintiffs and defendants, and costs as between the defendants and the ferry company.

The defendants obtained from a local Judge at Windsor an order giving them liberty to serve a third party notice directed to the ferry company, pursuant to Con. Rule 209.

The notice served on the ferry company, after stating that the plaintiffs had brought an action to recover from the defendants \$2,140 for the rent or hire of the race track, then claimed that the ferry company had agreed to pay \$15 per day as part of the rent as set out in the statement of defence. The ferry company were also notified that, if they wished to dispute the plaintiffs' claim as against the defendants, or their liability to the defendants, or in the alternative to the plaintiffs, they must cause an appearance to be entered within ten days after service of the notice.

The ferry company did not enter an appearance, nor did they move against the order of the local Judge granting liberty to serve the third party notice within four days after the service thereof.

The ferry company moved before the local Judge for an order setting aside the third party notice, and the order granting leave to serve the same and the service thereof, or for an order extending the time for entering an appearance to the third party notice. The motion was, on the 8th February, dismissed, except as to that part asking that the time be extended for entering an appearance,—the time being extended for ten days from the date of the order.

The ferry company appealed from so much of the order as refused to set aside the third party notice and the order granting leave to serve the same, and the appeal coming on before Mr. Justice Ferguson, he dismissed it with costs. And it is from such order that the present appeal is taken.

Under Rule 209 a defendant may serve a third party notice where he "claims to be entitled to contribution, or indemnity from, or any other relief over against any person not a party to the action."

George M. Hendrie, the president and treasurer of the defendant company, made an affidavit in the action upon which the order granting leave to serve the third party notice was obtained. This affidavit contained substantially the allegations above referred to in the statement of defence. When cross-examined on his affidavit he said in part: "The action is brought on a lease or agreement with the plaintiffs for the use of the race track of the plaintiffs. I do not think the third party had anything to do with the lease. The terms were all made between the plaintiffs and defendants, but the third party was brought in before the lease was made. The third party had nothing to do with the business of the defendants. The only interest it had was the increased traffic to its boats by persons attending the races from Detroit. For that the third party agreed to 'donate' \$15 per day while the races were carried on, so I am informed, and it is in consequence of that agreement it is sought to make it a third party in this action. And it is that agreement I understand the third party disputes. I understood that Mr. McKee and William A. Hanrahan saw Mr. Campbell of the ferry company and they told myself and Mr. Parmer of the agreement. I do not know upon whose behalf they saw Mr. Campbell. We did not care upon whose behalf they acted as long as the defendants received the money. There was nothing said about who was to receive the money, as long as we got the benefit of it. If the plaintiffs received the money they would credit the defendants with it. If the defendants received it we would pay it over to the plaintiffs."

Mr. Hendrie on re-examination said : " I did not make use of the words 'brought in' appearing in the early part of my examination."

Where the claim against the third party is for " contribution or indemnity " against a third party, what the Court is called upon to do is to see that the claim is *bond fide*, and whether, if established, it will result in contribution or indemnity: *Carshore v. North Eastern R. W. Co.* (1885), 29 Ch. D. 344. No claim for " indemnity " could be established in this case, for such a claim must arise under a contract of indemnity express or implied: *Speller v. Bristol Steam Navigation Co.* (1884), 13 Q. B. D. 96. And Chitty, J., in *Birmingham and District Land Co. v. London and North-Western R. W. Co.* (1886), 34 Ch. D. at p. 267, said : " Now, having regard to the authorities which have been cited on this Rule, it is plain that the term ' indemnity ' is used in such a sense that a defendant who applies under the Order must shew that he has a claim to indemnity on some contract express or implied, or that he has a right thereto on some equitable principle. It is not sufficient for him to say that he wants to bring in the third party because there is an issue between himself and such third party, analogous to, or the same as, the issue between the plaintiff and the defendant in the action." And see the judgment of Bowen, L. J., in appeal at p. 274. See also *Pontifex v. Foord* (1884), 12 Q. B. D. 152.

This is not a case for " contribution," for contribution arises where two or more persons are subject to a common liability, other than for a fraud or other wilful tort: *Johnson v. Wild* (1890), 44 Ch. D. 146. Chitty, J., said in that case, at p. 150 : " In a common demand for which two persons are liable, if one pays then there is a right of contribution on the part of the one who makes the payment against the one who does not." See also *Lowe v. Dixon* (1885), 16 Q. B. D. 455, a case of co-adventurers; *Moorhouse v. Kidd* (1898), 25 A. R. 221, a case of co-sureties.

Then does this case come within that part of the Rule providing for "other relief over?" I think not. According to the statement made by the plaintiffs to Mr. Hendrie, the ferry company agreed to "donate" \$15 per day while the races were carried on, but the ferry company had nothing to do with the lease, nor had the donation so promised to be given any reference to the lease, although if, and when, paid to the plaintiffs the defendants would get the benefit of the payment. If there was an agreement by the ferry company to pay the plaintiffs the \$15 per day which was enforceable at law, it was an independent right and does not form such a claim as entitles the defendants to relief over against the ferry company.

As to the other point, that the third party had no *locus standi* to move until he had entered an appearance, *Horwell v. London General Omnibus Co.* (1877), 2 Ex. D. 365, and *Corrie v. Allen* (1883), 48 L. T. N. S. 464, hold that the proper practice is not to enter an appearance.

The appeal must be allowed and the order of Mr. Justice Ferguson confirming the order of the local Judge set aside, and also the order of the local Judge refusing to set aside his own order granting leave to serve the third party notice, and such third party notice, and the service thereof, are set aside with costs to be paid by the defendants to the third party.

MEREDITH, C. J., and ROSE, J., concurred.

The defendants moved for leave to appeal to the Court of Appeal from this decision, and their motion was heard by Moss, J. A., in Chambers, on the 10th March, 1900.

F. A. Anglin, for the defendants.

Aylesworth, Q. C., for the ferry company.

Judgment was delivered on the 30th March, 1900.

Moss, J. A.—Application by defendants for leave] to appeal from order of a Divisional Court reversing an order

of Ferguson, J., who affirmed an order of the local Judge at Windsor dismissing a motion on behalf of the Detroit, Belle Isle, and Windsor Ferry Company to set aside a third party notice and an order granting leave to serve same.

Upon consideration I do not think the leave should be granted.

It was urged for the defendants that the Divisional Court has placed a construction upon the words "or any other relief over" in Rule 209, which will, if it stands, be of general application.

But I do not think anything more has been done than to determine their bearing upon the facts of this case, and these facts are of a nature not likely to be of frequent occurrence.

There is nothing special in the case beyond the fact that a Divisional Court of three Judges has differed from the view of another member of the High Court and a local Judge; and the amount involved is comparatively small.

The decision of the Divisional Court does not deprive the defendants of the benefit of the alleged dealings with the ferry company as a defence to the plaintiffs' action. If the defence is successful, there is no occasion for seeking relief over.

The motion must be refused.

In any case I should not have considered it proper to give leave to appeal on the technical grounds, and would have confined it to the construction of the Rule.

JACKSON V. GARDINER.

Judgment—Default of Defence—Ex Parte Application—Defence Filed after Default Note—Motion to Set Aside Judgment—Costs—Rules 263, 358, 586.

A statement of defence filed after the pleadings have been noted as closed for default of defence under Rule 263, is irregular, but not a nullity, and should be regarded as evidence of an intention to defend; and where, as now permitted by Rule 568, a motion for judgment upon the statement of claim is made *ex parte*, and the fact of the defence having been filed is brought to the knowledge of the Judge, he should direct notice to be served in order to give the defendant an opportunity to make his defence regular.

In this case judgment having been granted *ex parte*, it was ordered that there should be no costs of the defendant's motion for relief under Rule 358, which was granted.

[March 31, 1900.—*Boyd, C.*]

MOTION by the defendant under Rule 358* to rescind or vary an order or judgment granting the plaintiff the relief prayed by the statement of claim, pronounced by a local Judge upon the *ex parte* application of the plaintiff under Rules 586† and 593, after the pleadings had been noted by the plaintiff as closed for default of a statement of defence under Rule 263‡.

* 358. A party affected by an *ex parte* order * * may move to rescind or vary the order before the Judge or officer who made the same, or any Judge or officer having jurisdiction, within four days from the time when the order comes to his notice, or within such further time as the Court or a Judge may allow, and whether the order has been acted upon by the party issuing it or not.

† 586. Except where otherwise provided in these Rules or where otherwise ordered by the Court or a Judge, a defendant who fails to deliver a statement of defence and against whom the pleadings have been noted as closed, shall be deemed to admit all the statements of fact set forth in the statement of claim * * and shall not be entitled to notice of any subsequent proceedings in the action.

‡ 263. Where any party makes default in delivering a statement of defence * * within the time limited therefor, in cases where interlocutory or final judgment cannot be signed, the opposite party may, at any time before the pleading is filed, upon proof of the default, by præcipe to the officer with whom the pleadings are filed, require him to note that the pleadings in the action are closed as to the party in default; and thereupon the officer shall enter such note in the pleadings book accordingly, and thereafter no pleading by the party in default shall be received or filed without the order of a Judge.

The motion was heard by BOYD, C., in the Weekly Court, on the 29th March, 1900.

E. Taylour English, for the defendant.

J. H. Moss, for the plaintiff.

BOYD, C., after hearing counsel, made an order setting aside the note and the judgment and allowing the defendant in to defend, and also allowing the plaintiff to abandon a claim made in the action for unliquidated damages, and transferring the other claims in the action to a County Court for trial; and reserved judgment as to costs.

Judgment was delivered on the 31st March, 1900.

BOYD, C.—It is quite apparent in this case that the defendant was minded to put in his defence upon his motion failing to set aside the statement of claim, but he failed to do so before the officer entered him in default under Rule 263. That step was taken ten minutes before the usual hour for opening the office (*i.e.*, ten o'clock.) The defendant attended and filed the defence at ten, though by the Rule no pleading was to be received after the noting without a Judge's order.

This state of facts was stated to the local Judge when the plaintiff moved *ex parte* for judgment under Rule 586, but he granted the judgment asked, though the irregular defence was made known to him. This is not a commendable course of practice, for reasons pointed out in *Graves v. Terry* (1882), 9 Q. B. D. 170, and *Gibbings v. Strong* (1884), 26 Ch. D. 66. Though the defence was put in after time and without leave, and so may be accounted irregular, it should not be treated as a nullity: *Mackinnon v. Johnson* (1833), 3 O. S. 169. The question thus before the Judge was whether the plaintiff deliberately intended not to defend, and he should look at everything the knowledge of which may enable him to do justice between the parties. In this case it would have been clearly right to have had notice of motion for judgment served on the defendant

and given him a chance to make his defence regular by getting leave to file it on proper terms as to costs.

The present *ex parte* order for judgment has driven the defendant to move under Rule 358 to get the relief that might have been simply and directly given.

Having regard to these circumstances, and granting leave to plaintiff to abandon the unliquidated part of her claim, and so making a transfer of the reduced claim to the County Court, I think the present order vacating the note and judgment and giving leave to defend should be without costs to either party.

YOUNG V. DOMINION CONSTRUCTION CO.

Writ of Summons—Substituted Service—Foreign Corporation—Rules 146, 167.

Service of process must be, if possible, personal, or, in the case of a corporation, upon the duly constituted agent; the substitutional method is to be followed only when prompt personal service appears by affidavit to be unavailable.

Rule 146 regulates substituted service of process. Rule 167 covers miscellaneous proceedings in the progress of litigation, but is not to be used so as to nullify the special Rule applicable to writs of summons.

And where the plaintiff shewed that he knew where the head office of the defendants, a foreign corporation, was, and that they had no office or definite place of business within Ontario, and there was nothing to shew that they could not be easily served at the head office, an order for substituted service was vacated.

[March 28, 1900.—*Boyd, C.*]

[April 2, 1900.—*Divisional Court.*]

THIS was an appeal by a firm of solicitors practising in Ontario from an order of the Master in Chambers refusing to set aside his former order, made on the *ex parte* application of the plaintiff, allowing notice in lieu of the writ of summons to be served upon the appellants in substitution for the defendants, a foreign corporation. The facts are stated in the judgments.

The appeal was heard by BOYD, C., in Chambers, on the 26th March, 1900.

D'Arcy Tate, for the appellants.

A. M. Lewis, for the plaintiff.

Judgment was delivered on the 28th March, 1900.

BOYD, C.—The defendants are an American corporate body, with head office at Jersey City, and the plaintiff's claim is in respect of services rendered in Ontario to that corporation. Leave was obtained upon affidavit of the plaintiff to issue a writ for service out of Ontario and to serve notice thereof on the company: Rules 163 and 165. Application was then made *ex parte* and an order obtained for substitutional service of the notice upon solicitors in Hamilton said to be acting for the company in suits and proceedings pending in the Courts of Ontario. The order was moved against and affirmed by the Master, and then the solicitors appealed on the ground that the process or notice could be easily and readily served personally in New Jersey. The appellants rely on Rule 146.* The respondents say the *ex parte* order was made under the discretion given by Rule 167.† The plaintiff's affidavit shews that he knows where the head office of the corporation is, "where process can be served," and his solicitor's affidavit shews that the defendants have no office or definite place of business within the jurisdiction of the Court.

*146. Where service is required, the writ may be served in any county or district in Ontario, and the service thereof shall be personal; but if it appears to the Court or a Judge on affidavit that the plaintiff is unable to effect prompt personal service, the Court or Judge may order substituted or other service, by advertisement or otherwise.

†167. Where a party to any action or matter is absent from Ontario or cannot be found therein to be served, the Court or a Judge may authorize proceedings to be taken against him according to the practice of the Court in the case of a defendant whose residence is unknown, or in any other manner that may be directed, if the Court or a Judge deems such mode of proceeding conducive to the ends of justice; and service so effected shall be equivalent to personal service upon the party.

For aught that appears, this company can be served as easily as any like corporation in Ontario. There is no suggestion in the affidavits or by counsel that the plaintiff is "unable to effect prompt personal service," which is a condition required before substituted service can be sanctioned: Rule 146 and *Robertson v. Mero* (1883), 9 P. R. 510.

I do not see that foreign corporations defendants should be treated differently from resident corporations in regard to the service of process. The primary rule is that the service of process be, if possible, personal or upon the duly constituted agent, which is tantamount to personal service. Failing this, the Court may grant permission to make substituted service in such a way as is likely to bring notice of the proceeding home to the company. But the substitutional method is only to be followed when prompt personal service appears by affidavit to be unavailable. All cases of substitutional service shew a failure or a difficulty in effecting personal service: *Adler v. Benjamin* (1885), 1 Times L. R. 308; *Ditton v. Bornemann* (1886), 3 Times L. R. 3; *Field v. Bennett* (1886), 3 Times L. R. 239, 56 L. J. Q. B. 89; *Margrett v. Emanuel* (1890), 6 Times L. R. 453; *Hope v. Carnegie* (1865), L. R. 1 Eq. 126.

Rule 146 is the Rule which regulates substituted service of process; Rule 167 is a sort of omnibus Rule covering miscellaneous proceedings in the progress of litigation, but is not to be used so as to nullify the special Rule applicable to writs of summons: *Pearson v. Campbell* (1866), 2 Ch. Ch. 25.

This order was improvidently made and should be vacated. Costs to be paid by plaintiff.

The plaintiff appealed from the order of the Chancellor, and his appeal was heard by a Divisional Court composed of MEREDITH, C. J., and MACMAHON, J., on the 2nd April, 1900.

A. M. Lewis, for the plaintiff. The solicitors do not deny that they are the general solicitors of the defendants.

Rule 146 does not apply to service out of Ontario, and Rule 167 gives a discretion, which was properly exercised by the Master: see *Hope v. Hope* (1853), 19 Beav. 237; *Armitage v. Fitzwilliam*, [1875] W. N. 238; *Adler v. Benjamin* (1885), 1 Times L. R. 308. The defendants have agents in this jurisdiction—these solicitors. The irregularity of the service, if it was irregular, was waived by the defendants entering an appearance; the appearance, it is true, was a conditional one, but such an appearance is not applicable to the position here, but only where the defendant desires to dispute the jurisdiction of the Court.

D'Arcy Tate, for the solicitors, was not called on.

MEREDITH, C. J.—The normal method is by service on the corporation itself. Even assuming that Rule 146 is inapplicable, and that Rule 167 is applicable, the plaintiff must shew that there is a difficulty in effecting service in the normal way. No difficulty is suggested as to effecting service in Jersey City. As to the alleged waiver, it is not shewn that an appearance has been entered at all. We do not decide what the effect would be of entering a conditional appearance. We must deal with the case as it was before the Chancellor, and we entirely agree with his view.

MACMAHON, J., concurred.

Appeal dismissed with costs.

ALLISON V. BREEN.

[TWO ACTIONS.]

Limitation of Actions—Judgment—Revivor—Time—Notice—Ex Parte Order—Application to Set Aside.

Decisions of STREET, J., and the Master in Chambers, *ante* p. 119, refusing to set aside order reviving judgment, affirmed on appeal.

Boice v. O'Loane (1878), 3 A. R. 167, as to the lifetime of a judgment, followed in preference to English decisions.

The practice of dealing with the question raised on an application to set aside an *ex parte* order as if the application were a substantive one for such order, approved.

[April 10, 1900.—*Divisional Court.*]

APPEALS by Mary Wood from the orders of STREET, J., *ante* p. 119, affirming orders of the Master in Chambers refusing to set aside certain prior orders reviving the actions, under the circumstances mentioned in the former report.

The appeals were heard by a Divisional Court composed of MEREDITH, C. J., and FALCONBRIDGE, J., on the 3rd April, 1900.

Tytler and C. J. McCabe, for the appellant.

J. J. MacLennan, for the plaintiff by revivor.

Judgment was delivered on the 10th April, 1900.

MEREDITH, C. J.—The motions by way of appeal from the orders of my learned brother Street, affirming the orders of the Master in Chambers, must be dismissed.

We were invited by the appellant's counsel to reconsider the question passed upon by the Court of Appeal in *Boice v. O'Loane* (1878), 3 A. R. 167, and, in view of the English cases which have been decided upon the section of the Imperial Act which corresponds to sec. 23 of R. S. O. ch. 133, to hold that that case is to be treated as no longer an authority binding upon the Courts of this Province.

It is impossible to give effect to this contention. *Boice v. O'Loane* has not been overruled or impugned within the meaning of sec. 81 of the Judicature Act, but has been uniformly followed and has been recognized as correctly deciding the point determined by it in cases which have been considered by the Court of Appeal since the English cases upon which the appellant relies.

Apart from this consideration, it is to be observed that the word "judgment" was dropped from sec. 23 in the revision of 1887, so that at the time the orders for leave to issue execution made in the lifetime of the judgment debtor were made, even if the English cases were to govern, the period of limitation was twenty and not ten years.

It was further objected that one of these orders was improperly made *ex parte*, but it is now too late to raise that objection, which at most amounted only to an irregularity.

I agree with the contention of the appellant that the orders made on the 20th January, 1900, for leave to issue execution against her as the personal representative of the judgment debtor ought not to have been made *ex parte*: *Re Shephard, Atkins v. Shephard* (1889), 43 Ch. D. at p. 137; *National Bank v. Cullen*, [1894] 2 I. R. 683; but this difficulty in the way of the respondent has been removed by the course taken by the Master in Chambers on the application to rescind these orders, of dealing with the matter as on substantive motions for leave to issue execution against the appellant; so treating them, it is clear that the orders were rightly made.

The course adopted by the Master in Chambers was in accordance with a practice which has long obtained, and which I have the authority of the Chancellor and the Chief Justice of the Queen's Bench for saying, is a convenient and satisfactory practice, and one that should be followed—a view with which I entirely agree.

The dismissal of the appeals must be with costs.

FALCONBRIDGE, J.—I agree.

APPLEBY ET AL. V. TURNER ET AL.

Judgment—Action on Bond—Rule 580—Writ of Summons—Special Indorsement—Statement of Claim—Service by Posting—Rule 574—Motion for Judgment—Assessment of Damages.

An action against the sureties in an appeal bond to recover the plaintiffs' costs of an appeal is in the nature of a claim for damages requiring assessment (see Rule 580), and a special indorsement of the writ of summons is inappropriate, and a judgment for default of appearance or default of defence is a nullity not curable by delay or acquiescence.

The defendants in this case not having appeared, the plaintiffs filed and posted up copies of a statement of claim, without filing the writ of summons and affidavit of service :—

Held, that the posting of the statement could not, having regard to Rule 574, be treated as a service upon the defendants. But, even if it could be so treated, a motion for judgment thereon and an assessment of damages would be necessary.

Star Life Assurance Society v. Southgate (1898), 18 P. R. 151, followed.

[April 18, 1900.—*Divisional Court.*]

THIS action was brought to recover the taxed costs of certain appeals to the Court of Appeal, for the payment of which the defendants had become bound by the appeal bond in the action, as sureties. The writ in the action was issued on the 24th October, 1898.

On the 18th November, 1898, the plaintiffs' solicitor filed a statement of claim in the office from which the writ of summons had been issued, and at the same time posted up two copies of the statement of claim in the same office.

No appearance was ever entered by either of the defendants.

On the 29th November, 1898, the plaintiffs' solicitor filed the writ of summons, with an affidavit of the sheriff's officer attached to it, of personal service of it upon the defendants, and upon the same day he entered final judgment against both defendants. He filed at the same time his own affidavit that he had posted up two copies of the statement of claim as above mentioned on the 18th November, "as and for service of the same upon the defendants herein, who have not entered an appearance to the writ of summons."

The indorsement upon the writ of summons was in

form a special indorsement, and all the plaintiffs, viz., "Thomas Appleby, George R. Appleby, and John Ezard and George Appleby, the last two being the executors of the will of William Appleby, deceased, and Elizabeth Drew," claimed from the defendants "their taxed costs of a certain action in the Court of Appeal for Ontario, amounting in all to \$340.45, under a bond given by the defendants to the plaintiffs as security for such costs, together with interest thereon, of which the following are the particulars :

1. Taxed costs of Thomas Appleby and George R. Appleby, \$138.10.

Interest thereon from the 16th September, 1898.

2. Taxed costs of John Ezard and George R. Appleby, executors aforesaid, \$122.15.

Interest thereon from the 16th September, 1898.

3. Taxed costs of Elizabeth Drew, \$80.20.

Interest thereon from the 16th September, 1898."

The judgment was entered as follows:—"Tuesday the 29th day of November, 1898. The defendants not having appeared and not having delivered any statement of defence : It is this day adjudged that the plaintiffs recover against the said defendants, the said Thomas Appleby and the said George Richard Appleby the sum of \$139.71 ; the said John Ezard and George R. Appleby, executors of the will of William Appleby, deceased, the sum of \$123.57 ; and the said Elizabeth Drew the sum of \$81.10 ; and \$73.40 for costs ; to be recovered by the plaintiffs against the defendants."

On the 5th of December, 1898, the plaintiffs Thomas Appleby, George R. Appleby, and Elizabeth Drew obtained a garnishee order from the local Judge at Brampton against their co-plaintiffs John Ezard and George R. Appleby, as executors of William Appleby, deceased, as garnishees, attaching all debts due from the garnishees to Sarah Elsie Turner, one of the judgment debtors. This was served on the 7th December, 1898, upon the defendant Sarah Elsie Turner. By the order she was

ordered to attend on the 17th December, 1898, before the local Judge at Brampton on an application by the judgment creditors other than the garnishees for payment over of the amount due. On the 19th December, 1898, an order was made for the payment over by the garnishees, the executors, to their co-plaintiffs, of the sum of \$159.91, less certain costs to be taxed.

In the month of February, 1900, the defendants applied to set aside the judgment and all the subsequent proceedings, upon the grounds that the defendant R. L. Turner had never been served with the writ, that the judgment against the defendants was not authorized by the practice, that it was irregular in form, and that no statement of claim had been served.

The defendant R. L. Turner denied in his affidavit filed that the writ of summons had ever been served upon him or that it had come to his knowledge until February, 1900. The sheriff's officer swore to having served it personally upon him, and went fully, upon being cross-examined, into the circumstances under which service had been effected.

On the 1st March, 1900, the Master in Chambers dismissed the application with costs, and on the 24th March, 1900, FALCONBRIDGE, J., dismissed with costs the defendants' appeal from the decision of the Master in Chambers.

The defendants then appealed to a Divisional Court, and their appeal was argued on the 9th April, 1900, before ARMOUR, C. J., and STREET, J.

Hislop, for the defendants.

W. E. Middleton, for the plaintiffs.

On the 18th April, 1900, the judgment of the Court was delivered by

STREET, J.—The practice to be followed upon a cause of

action upon a bond of the nature of that sued on here is laid down by the Court of Appeal in *Star Life Assurance Society v. Southgate* (1898), 18 P. R. 151.

The special indorsement of the writ here was unauthorized (see Con. Rule 580), and therefore the judgment cannot stand as upon a specially indorsed writ; the claim is in the nature of a claim for damages requiring assessment, and final judgment could not, therefore, be entered for it in any event upon default of statement of defence. There is here the further objection that no statement of claim was served upon the defendants. It is true that the plaintiffs posted up a statement of claim for each defendant in the office from which the writ had been issued, under Rule 330; but that, being a proceeding taken upon default of appearance, was of no avail because of the omission to file the writ of summons with affidavit of service, which by Rule 574* is to be first done. The plaintiffs, not having performed this condition precedent, cannot treat the posting up of the statement of claim as a service upon the defendants. But, even if the posting up of the statement of claim could be treated as service upon the defendants, the case above referred to has settled that the plaintiff cannot take judgment in such a case as the present without a special motion for judgment followed by an assessment of damages; and the judgment which the plaintiffs have entered here by default without any motion, and without any assessment, is, therefore, entirely unwarranted by the practice, and is a nullity not curable by delay or acquiescence: *Hoffman v. Crevier* (1899), 18 P. R. 473; *Goodwin q. t. v. Parry* (1792), 4 T. R. 577; *Roberts v. Spurr* (1835), 3 Dowl. 551; Archbold's Practice, 12th ed., p.

*574. Where a defendant fails to appear the plaintiff before taking proceedings upon default of appearance shall file an affidavit of service of the writ or the notice in lieu thereof, or the undertaking of the defendant's solicitor accepting service and agreeing to enter an appearance, with an affidavit verifying the undertaking filed, as the case may be.

1471; *Rogers v. Hunt* (1854), 10 Ex. 474; *Smurthwaite v. Hannay*, [1894] A. C. at p. 501.

The judgment and the garnishee proceedings and all other proceedings founded upon it must, therefore, be set aside, with costs of the application and appeals here and below.

TANNER V. WEILAND ET AL.

Security for Costs—Appeal to Divisional Court—Rule 825.

Rule 825, providing that no security for costs shall be required on a motion or appeal to a Divisional Court, does not preclude a defendant from obtaining an order for security for costs where the plaintiff has taken up his residence abroad after a judgment dismissing his action without costs, from which his appeal to a Divisional Court is pending. *Arnold v. Van Tuyl* (1899), 30 O. R. 663, distinguished.

[March 27, 1900.—*The Master in Chambers.*]

[March 30, 1900.—*Boyd, C.*]

[April 4, 1900.—*Divisional Court.*]

MOTION by the defendant Christina W. Weiland for an order requiring the plaintiff to give security for the applicant's costs, upon the ground that the plaintiff had left the jurisdiction of this Court and become a resident of the United States of America. This happened after the action had been tried and judgment given dismissing it without costs, from which judgment the plaintiff had appealed. The appeal was pending before a Divisional Court, but had not been heard.

The motion was heard by the Master in Chambers on the 26th March, 1900.

Haverson, for the applicant.

Grayson Smith, for the plaintiff, admitted that the plaintiff had left the jurisdiction, but contended that under Rule 825* no security for costs could, under the

*825. No security for costs shall be required on a motion or appeal to a Divisional Court.

peculiar circumstances, be demanded : *Arnold v. Van Tuyl* (1899), 30 O. R. 663.

Judgment was delivered on the following day.

THE MASTER IN CHAMBERS.—In *Arnold v. Van Tuyl*, 30 O. R. 663, an order for security for costs had been made, and what was decided was that a further order, under the provisions of Rule 825, was improper. This case is different ; since the judgment was given the plaintiff has left the country, and, in consequence, the defendant is entitled to an order under Rule 1198. Rule 825 *et seq.* are under the heading “ Stay of Execution and Security on Appeals,” and, in my opinion, are not intended to interfere with the rights of litigants under Rule 1198 *et seq.* The appeal to the Divisional Court is a step in the action, and security may, I think, in such a case as the present, be ordered. Security will be ordered.

The order as drawn up and issued required the plaintiff to give security for the costs of the action and directed that in the meantime all proceedings be stayed.

The plaintiff appealed from the Master’s order, and his appeal was heard by BOYD, C., in Chambers, on the 30th March, 1900. The same counsel appeared. BOYD, C., at the conclusion of the argument, dismissed the appeal without costs.

The plaintiff appealed from the Chancellor’s order, and his appeal was heard by a Divisional Court composed of MEREDITH, C. J., and FALCONBRIDGE, J., on the 4th April, 1900.

Grayson Smith, for the plaintiff. The only costs to which the order can apply are the costs to be incurred in the Divisional Court, for which no security can be ordered : Rule 825 ; *Arnold v. Van Tuyl*, 30 O. R. 663. The

order for a stay can apply only to the proceedings before the Divisional Court.

Haverson, for the defendant Christina W. Weiland, was not called upon.

The judgment of the Court was delivered by

MEREDITH, C. J.—We do not see any reason for differing from the conclusion come to by the Master in Chambers and the learned Chancellor. The Rule which Mr. Smith invokes is to be read in connection with the other Rule as to security for costs, and the distinction between the case as he puts it and the case as it actually exists is that this order is not for security for costs of the appeal, but for security for costs of the action. There may be further proceedings in the action beyond the appeal to the Divisional Court, and it is only an incident, if the appeal be dismissed with costs, that the costs of the appeal are affected by the order.

Arnold v. Van Tuyl was an entirely different case. The appeal was from a County Court, and after the appeal had been launched, as I recollect the facts of the case, the learned Judge of the County Court, although the action had been dismissed with costs, made an order for security for costs; that could apply only to the costs in the County Court, and could not apply to the costs in the High Court.

The appeal is dismissed with costs to the respondent in any event.

SYDNEY CHEESE AND BUTTER FACTORY ASSOCIATION v.
BROWER.

Discovery—Action for Account—Denial of Right—Production of Books—Prejudice.

To an action by an incorporated association of cheesemakers against the president and salesman for an account of all moneys received by him for or on behalf of the plaintiffs for three years past, and the application thereof, and for delivery up of all books and documents in his possession belonging to the plaintiffs, and for an account of profits made by the defendant, one of the defences was that the defendant undertook the sale of the plaintiffs' cheese as a part of his own business, and that it was expressly agreed that he should not be called upon to divulge the names of the persons from whom he received orders, or give any other information touching his business or the account of sales or the bank account in connection with his business, and when examined for discovery he objected to produce his books and documents shewing sales and prices realized and persons to whom sales made, because, as he alleged, that would in effect give the plaintiffs what they sought in the action before they had established their right to it, which was expressly contested :—

Held, that, as the fiduciary relationship existing between the parties was practically admitted, the position of the plaintiffs in seeking accounts and inquiries was not exactly like that of a plaintiff whose right depended on his establishing a case for them at the hearing. The defendant set up an extraordinary agreement, the probability of establishing which was not very great, and this was an element in determining the matter in the exercise of a sound discretion. The plaintiffs were, therefore, entitled to the discovery.

[April 23, 1900.—*Divisional Court.*]

THE following statement of the facts is taken from the judgment of FALCONBRIDGE, J. :—

The plaintiffs by their statement of claim alleged : (1) that they were a company incorporated under the provisions of 51 Vict. ch. 24 (O.), carrying on the business of manufacturing cheese in the township of Sydney, in the county of Hastings ; (2) that the defendant was the president and salesman of the plaintiffs' company during the years 1893 to 1899, both inclusive, and as such salesman it was his duty to sell and dispose of the cheese manufactured by the plaintiffs and to receive and deposit the moneys of the plaintiffs in the Dominion Bank at Belleville, and to keep accounts thereof and render them annually to the plaintiffs, with proper vouchers, at the close of the year's

business, for which services he was paid by the plaintiffs and accepted the sum of \$100 each year; (3) that the defendant accordingly, as such agent and salesman of the plaintiffs, received from them all the cheese manufactured by them, and sold the same and received the proceeds thereof; (4) that the plaintiffs had since, and especially in and during the month of January, 1900, requested the defendant to render them a true and full account of the cheese received by him and of the sales thereof, and of the moneys of the plaintiffs which came into his hands, and to pay over to them the net proceeds thereof; (5) that the defendant had had ample time allowed him for complying with such request, but declined to so account; (6) that the defendant had never rendered to the plaintiffs a true or full account either of the said cheese or of the sale thereof or of the moneys arising therefrom, and had never paid over to the plaintiffs the net proceeds thereof; (7) that the defendant had also received other moneys of the plaintiffs arising from the sale of whey and calls from shareholders in the plaintiffs' company, which he had never accounted for; (8) that the defendant had never given to the plaintiffs any account of his dealings and transactions as their salesman and agent, nor produced any vouchers from which the plaintiffs could ascertain the prices the defendant had been receiving for their cheese, and the plaintiffs submitted that the defendant had in all instances received higher prices upon the sale of the plaintiffs' said cheese than he had returned to the plaintiffs; (9) that it was the duty of defendant to deposit the moneys arising from the sale of the plaintiffs' cheese immediately in the Dominion Bank to the credit of the plaintiffs, where the same would bear interest, but he neglected so to do, and used the said moneys in his own business. And the prayer of the statement of claim was: (1) that an account might be taken of all the sums of money received by or come to the hands of the defendant as such salesman, etc., for or on account of the plaintiffs for the last three years and the application thereof, and that the defendant might be ordered to pro-

duce all proper and necessary vouchers and ordered to pay the amount which should be found due from the defendant to the plaintiffs, and to deliver up to the plaintiffs all books and documents in his possession belonging to the plaintiffs; (2) that the defendant might be ordered to account to the plaintiffs for the profits he made out of their money, or, in the alternative, to pay to the plaintiffs interest upon such money of the plaintiffs as he might have used in his own business.

By the statement of defence the defendant (1) denied the allegations contained in the statement of claim, and further stated (2) that he was a large shareholder in the plaintiffs' company; (3) that he was and had been for twenty-five years engaged in the cheese business, with a large and valuable clientèle in Great Britain, from whom he received orders for the purchase of cheese; (4) that in the early years of his business the English houses gave orders for cheese free on board the cars at Belleville, that is to say, the defendant would receive instructions from the buyer to pay a certain price and forward the cheese, and they would pay the freight and insurance and one-quarter cent per pound to the defendant to cover his office expenses, cablegrams, and other incidental expenses, for his time and trouble; (5) that for a number of years past the method of conducting the business had been changed, and the orders received for cheese were what were known as C. I. F. orders, that is to say, a larger price was paid for the cheese laid down in Great Britain at the place designated, out of which the defendant had to pay the cost, insurance, freight, storage, rent, office, and all the expenses incidental to his office and remuneration, these latter charges being fixed as previously at one-quarter cent per pound; (6) that the defendant's method of business was well known to the plaintiffs, and they and the former company, composed of the same shareholders, desiring to avail themselves of the experience and knowledge and large clientèle of the defendant, requested him to sell the cheese manufactured by them from year to year as a part of his

regular business, and it was the true understanding and agreement between the plaintiffs and the defendant that the cheese manufactured by the plaintiffs should go in with and form a part of the orders which the defendant from time to time received for cheese, he having a full discretion to exercise his judgment in the matter ; (7) that, in order the more effectually and beneficially for the plaintiffs to carry out this arrangement, the defendant was induced to accept and did accept the office of president in the plaintiffs' company for over twenty years until the month of December, 1899, and was authorized as such president to sell the plaintiffs' cheese as above mentioned ; (8) that the defendant's business was valuable, chiefly by the large clientèle and connection which he had in various parts of Great Britain and from whom he received orders, and it was distinctly understood and agreed that the defendant would only accept the onerous duties (for which the merely nominal sum of \$100 was paid) of president, and of placing the plaintiffs' cheese, on the condition and agreement that in no instance should he be called upon to divulge the name or names of the houses from whom he received orders, or give any other information touching his business or the account of sales or the bank account in connection with his business, and the defendant expressly notified the plaintiffs that under no other consideration would he act for them in placing their cheese, and the plaintiffs acquiesced in this arrangement and agreed to accept his statement of the result of the season's business without further account ; (9) that the defendant, in accordance with this well understood arrangement and agreement between the parties, had for over twenty years exercised his best judgment in placing the plaintiffs' cheese to the best interests of the plaintiffs ; (10) that the defendant rendered to the plaintiffs a true and accurate statement of the result of each season's transactions at each yearly meeting of the shareholders, and paid over to the plaintiffs and their shareholders the proceeds of the said cheese, settling at the end of each year for all the cheese disposed

of, and the defendant's accounts so rendered were audited and accepted, and the action of the defendant was approved of at each yearly meeting and the year's business closed; (11) that this method of conducting the business was entirely satisfactory to the plaintiffs, and was approved of from time to time at the yearly meeting of shareholders of the plaintiffs; (12) that by this method of dealing the plaintiffs realized the highest market price for their cheese, and the sales of their factory averaged higher than those of any other factory in the county, and the said method had the entire approval of the shareholders for over twenty years; (13) that the method above described of disposing of the plaintiffs' cheese applied to all the orders of the period when the defendant was president for the plaintiffs, except on a few occasions, among others in the years 1892, 1898, and 1899, when a portion of the season's make remained on hand at the end of the season, and in order to declare a final dividend and close the business for the year, the defendant, at the plaintiffs' request, took over and purchased the cheese at a price named, which was above the then market price, and except also in a few instances when sales were made at Belleville, in which case no deduction was made whatever. The interest upon proceeds of sales was duly adjusted with each year's business, some patrons who drew dividends before the general division were charged with interest, and the company received the benefit of this in the general interest received; (14) that this attempt on the part of the plaintiffs to have any further or other account than those already furnished to and accepted by the plaintiffs was in breach of the understanding and agreement under which alone the defendant consented to act for the plaintiffs, and could not be done without great injury to the defendant by exposing his clientèle and business connection (upon which his business depends) and other details of his business to the public; (15) that he has well and faithfully performed his duties as such president and salesman; (16) that upon the facts and under the circumstances hereinbefore set

forth the plaintiffs were estopped from calling upon the defendant to furnish any further or other accounts than those already furnished to and accepted by the plaintiffs; (17) that the plaintiffs were barred by gross laches from maintaining this action; (18) that the defendant pleaded the Statutes of Limitations; and (19) that this action was defective inasmuch as the same was not authorized by the plaintiffs, but by certain persons who were not legally authorized to represent the plaintiffs or to take proceedings herein.

On the examination of the defendant for discovery before the local Master of the High Court at Belleville, the counsel for the plaintiffs, on the admission of the defendant that he had certain books, documents, invoices, and cablegrams, shewing the different sales and prices realized and the persons to whom the goods were sold, that might throw light upon these different transactions, asked for their production to enable the plaintiffs to prepare for trial. Counsel for the defendant objected on the ground that this action was brought for an account, the right to which was denied by the defendant's statement of defence, and one of the main grounds of defence set forth therein was that it was expressly agreed between the plaintiffs and himself, as a condition upon which alone he would act as their president, that he should not furnish the accounts shewing the parties to whom he sold the cheese or the price realized thereon, and that to make him do this now, on a preliminary examination for discovery, would be in fact disposing of his defence on the pleadings.

The Master was of opinion that the defendant should produce his books and papers, the examination of the books to be confined solely to the dealings with the plaintiffs' property, and adjourned the examination until a subsequent day for the purpose of allowing the defendant to get his books and vouchers which he was to produce.

A motion was then made on behalf of the defendant before ARMOUR, C. J., in Chambers, by way of appeal from

such direction of the Master, and this motion was dismissed with costs.

The defendant appealed from the order of the Chief Justice, and his appeal was heard by a Divisional Court composed of MEREDITH, C.J., and FALCONBRIDGE, J., on the 5th April, 1900.

Shepley, Q.C., for the defendant, cited Wigram on Discovery, pp. 17, 20, 25; *Parker v. Wells* (1881), 18 Ch. D. 477; *Re Gyhon, Allen v. Taylor* (1885), 29 Ch. D. 834; *Turney v. Bayley* (1864), 4 DeG. J. & S. 332; *Great Western Colliery Co. v. Tucker* (1874), L. R. 9 Ch. 376; *Merchants Bank v. Tisdale* (1873), 6 P. R. 51; *MacGregor v. McDonald* (1886), 11 P. R. 386; *Hurst v. Barber* (1888), 12 P. R. 467; *Graham v. Temperance and General Life Assurance Co.* (1895), 16 P. R. 536; *Dickerson v. Radcliffe* (1897), 17 P. R. 586; *Parnell v. Walter* (1890), 24 Q. B. D. 441.

A. Hoskin, Q. C., and *Stewart Masson*, for the plaintiffs, referred to *Re Stapleford Colliery Co.* (1880), 49 L. J. Ch. 253; *Harris v. Harris* (1845), 4 Ha. 179; *Unsworth v. Woodcock* (1888), 3 Madd. 432; *West v. Benjamin* (1898), 29 S. C. R. 282.

Judgment was delivered on the 23rd April, 1900.

FALCONBRIDGE, J.—The defendant filed an affidavit setting forth his reasons for objecting to produce the documents in question as follows: "That I object to produce the accounts, books, and documents ordered and directed by the said local Master, on the ground that the same is in breach of my agreement and understanding with the plaintiffs, as set forth in my statement of defence and that the production of the same is calculated to, and I believe will, injure me and my business by disclosing my clientèle and business connection in the old country, and also disclosing details of my general business inseparably

connected with the books, accounts, and documents, giving the details ordered to be produced and shewn.

"I therefore submit that the discovery and production of the said books, accounts, and documents should not be ordered and directed until the plaintiffs' right to the accounts asked for in this action, and also the respective rights of the plaintiffs and myself under the terms of my agreement and understanding with the said plaintiffs, are first determined at the trial of this action.

"That I have a good defence to this said action upon the merits, and that this application is not made for delay."

The statement of facts, so far as one can judge of them from the allegations in the pleadings, in my opinion, distinguishes this case from the facts in any of the numerous cases and authorities cited on behalf of the defendant. Here the fiduciary relationship which exists between the parties must be practically admitted, so that the position of the plaintiffs in seeking accounts and inquiries is not exactly that of a person whose right depends on his establishing a case for them at the hearing. The defendant sets up an extraordinary agreement, and, without intending to prejudice the defendant's position in the controversy, either as matter of law or otherwise, I must say that, in my opinion, the probability in favour of the success of the defendant on this issue is, at present, not very great, and this fact, in a converse case, was considered by Sir George Jessel, M. R. (*In re Leigh's Estate, Rowcliffe v. Leigh* (1877), 6 Ch. D. at p. 263), to be an element in the determination of the matter, in the exercise of a sound discretion. Therefore I think that we ought not to refuse this discovery, and that the defendant's appeal should be dismissed with costs.

In addition to the cases cited upon the argument, I refer to *In re Leigh's Estate, ubi supra*; *Whyte v. Ahrens* (1884), 26 Ch. D. 717; *Dickson v. Harrison* (1878), 47 L. J. Ch. 686; *Bray on Discovery*, p. 24 *et seq.*

MEREDITH, C. J., concurred.

EVANS V. CHANDLER.

Costs—Scale of—Jurisdiction of County Courts—Ascertainment of Amount—Price of Goods Sold.

In an action for the price of goods sold and delivered, in which the plaintiff recovered \$290, it was contended that that amount was ascertained by the act of the parties, and therefore within the jurisdiction of the County Courts, because the goods were sold according to a price list agreed to, and therefore the amount was ascertainable by a simple computation:—

Held, not so.

Thompson v. Pearson (1899), 18 P. R. 420, distinguished.

[May 7, 1900.—*Rose*, J.]

ACTION for the price of goods sold and delivered, and counterclaim for breach of contract.

The action was tried before ROSE, J., without a jury, at Toronto, on the 5th March, 1900.

W. R. Smyth, for the plaintiff.

D. E. Thomson, Q. C., for the defendants.

Judgment was given for the plaintiff for \$290 with costs, and the counterclaim was dismissed with costs. Judgment was reserved as to the scale of costs, and was given on the 7th May, 1900.

ROSE, J.—I reserved the question of the scale of costs, the defendants contending that the amount recovered was within the jurisdiction of the County Court, being an amount ascertained by the act of the parties within the meaning of *Thompson v. Pearson* (1899), 18 P. R. 420. The argument was based upon the statement of fact that the goods were sold to the defendants according to a price list agreed to in 1896, and therefore that the amount of the plaintiff's claim was ascertainable by a simple computation.

The plaintiff does not admit this to be a correct state-

ment of the fact, but I assume it to be so for the purpose of examining the argument.

Thompson v. Pearson is clearly distinguishable. There the amount recovered was the amount fixed as the extent of the liability of the defendant. Here the amount is not fixed, unless it can be said that wherever the parties agree upon the price to be paid for articles purchased from a merchant the charges for which form the items of a long account, on which payments may or may not have been made, the sum of liability or the balance of account is ascertained. This would be extending the doctrine in *Thompson v. Pearson* much farther than the decision warrants. In view of the conflict of opinion in the case—the learned Chief Justice of the Common Pleas and Falconbridge, J., being of one opinion, and the learned Chief Justice of the Queen's Bench and Street, J., being of the contrary and governing opinion—I do not think the application of the principle of that decision should be extended. To hold this case to be within it, would, in my opinion, be contrary to the decisions and practice heretofore uniformly followed (*Furnival v. Saunders* (1866), 26 U. C. R. 119, and like cases) and make the amount claimed in every merchant's account an ascertained sum, for I see no difference between a price agreed upon at the time of purchase of each article and a purchase according to a price list furnished prior to opening the account.

There must be judgment for the plaintiff, with costs according to the High Court scale.

GIRARDOT V. WELTON ET AL.

Costs—Counterclaim—Relief Obtainable without Cross-action—Set-off.

The counterclaim of a defendant, properly so-called, is a claim by the defendant for a relief which cannot be obtained by him in the action; and calling a claim made by the defendant a counterclaim cannot make it one.

The plaintiff claimed a declaration that his interest as a chargee upon land could not be sold under the power in the defendant's mortgage upon such land, and, in the alternative, that he was entitled to redeem the defendant. By her pleading in answer the defendant alleged certain facts justifying her right to exercise the power of sale, and "by way of counterclaim" claimed payment of her mortgage, sale or foreclosure, possession, costs, and damages. The action was at the trial dismissed with costs, the defendant not desiring a foreclosure, which she was offered:—

Held, that the relief claimed by the defendant was obtainable by her in the action brought against her, and was not the subject of a cross-action or counterclaim; and the only costs taxable by the plaintiff against the defendant were such costs as were occasioned to the plaintiff by reason of the claim made by the defendants, treating it as a claim properly made in the action and dismissed; and such costs should be set off *pro tanto* against the defendant's costs of the dismissal of the action. The judgment dismissing the "counterclaim" with costs meant that such costs should be taxed as were appropriate to it in its true character.

Semble, that in this Province the law as to set-off is different from the English law, and here a set-off should not be treated as a counterclaim nor be pleaded as such.

[April 30, 1900.—*Armour*, C. J.]

AN appeal by the plaintiff from the taxation of his costs of the counterclaim of the defendant Welton by the local Master at Windsor, under the circumstances set forth in the judgment.

The appeal was heard by ARMOUR, C. J., in Chambers, on the 19th February, 1900.

F. E. Hodgins, for the plaintiff.

S. White, for the defendant Welton.

Judgment was delivered on the 30th April, 1900.

ARMOUR, C. J.—This action, so far as it relates to the defendant Welton, arose in this way. The defendants the Vaxellairs owned certain land which they agreed to sell to

the defendant Henquenet, and all the money payable under this agreement had been paid except \$4,000 which was payable on the 27th May, 1900, and on this \$4,000 the plaintiff had a charge of \$1,000. The defendants the Vaxellairs mortgaged this land to the defendant Welton for securing the sum of \$2,000 and interest. The plaintiff was a party to this mortgage for the purpose of consenting, and did thereby consent, to this mortgage having priority over his charge on the \$4,000 payable by Henquenet to the Vaxellairs.

Interest being in arrear to the defendant Welton on her mortgage, she proceeded to exercise the power of sale contained therein.

Thereupon the plaintiff brought this action, and obtained an interim injunction to restrain the sale, giving the usual undertaking as to damages. And he claimed in this action that the power of sale in the mortgage was the usual power in a short form mortgage, and contained no special provisions making it applicable to an equitable interest in real estate such as the Vaxellairs had in the said land; and he claimed against the defendant Welton a declaration by the Court that his interest in the said land or purchase money could not be sold under the power in the said mortgage to her, and that, if the Court should hold that it was so saleable, then, in the alternative, he claimed that he was entitled to redeem the defendant Welton; and he claimed a foreclosure against the Vaxellairs.

The defendant Welton, after alleging certain facts justifying her right to exercise the power of sale, proceeded thus in her statement of defence: "The defendant Welton, as such mortgagee as aforesaid, in the alternative and by way of counterclaim, claims payment, or in default sale or foreclosure, and possession of the said land, and costs of this action and of the proceedings under the said power of sale, and damages, and such other relief as she may be entitled to."

The learned Judge who tried the cause dismissed the

plaintiff's claim against all the defendants with costs, the plaintiff apparently not desiring a decree for redemption against the defendant Welton, and dismissed the counterclaim of the defendant Welton with costs, she not desiring a foreclosure, which the learned Judge offered her.

There was really no counterclaim properly so-called set up by the defendant Welton.

The paragraph which I have above quoted from her statement of defence was not a counterclaim properly so-called, and calling it a counterclaim could not make it one: *Cutler v. Morse* (1888), 12 P. R. 594; *Bennett v. White* (1889), 13 P. R. 149; *Sanderson v. Ashfield* (1889), *ib.* 230; *Ryan v. Fraser* (1884), 16 L. R. Ir. 253.

In the latter of which cases May, C. J., said (p. 261): "I do not think that the nomenclature of the defendant altered the substantial nature of the case." And Fitzgibbon, L. J., said: "In my opinion neither ingenuity nor inadvertence on the part of the pleaders should be allowed to succeed in making two causes of action out of that state of facts, or to found a liability to two sets of costs in the High Court in a case in which recourse ought not to have been had to that Court by either party."

If the defendant could make her statement above quoted a counterclaim by merely calling it so, then, had she accepted the foreclosure offered by the learned Judge, she would have been entitled to two sets of costs, her costs of the dismissal of the plaintiff's action, and her costs of her counterclaim as an independent or cross-action; but it is not in a defendant's power to make that a counterclaim which is not in reality one, by merely calling it a counterclaim.

In *Winterfield v. Bradnum* (1878), 3 Q. B. D. 324, Brett, L. J., said: "A counterclaim is sometimes a mere set-off; sometimes it is in the nature of a cross-action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counterclaim is, that they are wholly independent

suits which, for convenience of procedure, are combined in one action."

When he says, "a counterclaim is sometimes a mere set-off," he is speaking of the law in England; but this is not applicable to the law in this Province. Under the law relating to set-off in England, the defendant, if his set-off exceeded the plaintiff's claim, could not recover the excess in that action; his set-off could only be used as "a shield, not as a sword:" *Stooke v. Taylor* (1880), 5 Q. B. D. 569. And, consequently, in such case in England the defendant has to counterclaim for his set-off in order to recover the excess.

Under the law relating to set-off in this Province, the defendant, if his set-off exceeded the plaintiff's claim, could recover the excess. In this Province, therefore, a set-off should not be treated as a counterclaim, or be pleadable as such.

The counterclaim of a defendant properly so-called is a claim by the defendant for a relief which cannot be obtained by him in the action which is brought against him, and in order to obtain which he must resort to a cross or independent action, and such cross or independent action, when set up by him to the action brought against him, is a counterclaim properly so called; but, if the defendant's claim for relief is obtainable in the action brought against him, it is not a counterclaim properly so-called, and is not properly pleadable as such.

The relief claimed by the defendant in this action, as set out in the paragraph of her statement of defence above quoted, was a relief obtainable by her in the action brought against her, and did not require her to resort to a cross-action to obtain it, and it was not, therefore, the subject of a counterclaim properly so-called.

The foreclosure she would have obtained as a matter of course, and any damages to which she was entitled by reason of the sale being enjoined, she would have obtained under the undertaking as to damages in the order for injunction.

I am of the opinion, therefore, that the only costs taxable by the plaintiff against the defendant Welton are such costs as were occasioned to the plaintiff by reason of the claim made by the defendant Welton in the paragraph above quoted, which she abandoned, and which was dismissed by the learned Judge, not treating such claim as a counterclaim, but as a claim properly made by her in the action brought against her and dismissed: *Lund v. Campbell* (1885), 14 Q. B. D. 821. And such costs so taxed by the plaintiff against the defendant Welton should be set off against and deducted from the costs of the dismissal of the action taxed to her against the plaintiff.

In coming to this conclusion I am not trammelled by the judgment of the learned Judge dismissing the counterclaim of the defendant Welton with costs, for he did not adjudge it to be a counterclaim, but simply dismissed what was called a counterclaim, but was improperly so called; and dismissing it with costs means such costs as were properly taxable in respect of it in its true character.

The appeal must, therefore, be dismissed with costs, and the costs must go back to the taxing officer to be taxed upon the principle which I have indicated.

[An appeal from this decision was heard by a Divisional Court on the 8th May, 1900. Judgment was reserved. See *post*.]

BELL V. WILSON.

Costs—Slander—Verdict for \$1.

Where, in an action of slander, the jury returned a verdict for the plaintiff for \$1, the trial Judge refused to deprive the plaintiff of costs, his conduct not having been reprehensible, and the small verdict being explained by the condition of the defendant at the time the words were uttered.

[April 30, 1900.—*Boyd, C.*]

THIS was an action for slander, tried at Perth on the 24th April, 1900. The jury returned a verdict for the plaintiff for \$1.

A. C. Shaw, for the plaintiff.

Watson, Q. C., for the defendant, asked the Judge to deprive the plaintiff of costs.

Judgment was delivered on the 30th April, 1900.

BOYD, C.—I am asked to intervene as to costs, without which costs will follow the event, as in *Wilson v. Roberts* (1885), 11 P. R. 412. There should be some reason for interfering to deprive the plaintiff of costs in such an action, which can only be brought in the High Court, and the verdict, though small, shews that he had cause of complaint. The conduct of the plaintiff has not been reprehensible, but the same observation does not apply to the defendant. The small amount is not “contemptuous,” but is explained by the condition of the defendant at the time the abusive words were uttered. Given such circumstances, though the verdict be small, the best course, in my opinion, is simply not to interfere, and let the law award the costs according to the authorities and practice.

LOGAN ET AL. v. HERRING ET AL.

Costs—Will—Action to Set aside—Failure of—Dismissal without Costs—Costs out of Estate—Administration.

In an action to set aside a will for undue influence by two of the defendants, one of whom was the executor, the attack failed, and the action was dismissed, but without costs as to these two defendants, there being circumstances which might, unexplained, appear to be suspicious.

The other defendants, two pecuniary legatees under the attacked will, and a religious society to whom land was devised by it, submitted their rights to the Court, but appeared by counsel at the trial, and joined in resisting the plaintiffs' claim :—

Held, that these defendants were in a position similar to that of "interveners" under the English procedure, and were not entitled to costs out of the estate :—

Held, also, that they were not entitled to costs against the plaintiffs :—
Seemle, that they would be entitled to compensation in the administration of the estate.

[May 5, 1900.—*Boyd, C.*]

ACTION for a declaration that a certain paper writing was not the last will and testament of John Logan, late of the town of Dunnville, deceased, and to set aside the will, and for administration of the estate. The plaintiffs alleged undue influence.

The action was tried at Cayuga, before BOYD, C., without a jury, on the 1st May, 1900.

Watson, Q. C., and *W. D. Swayze*, for the plaintiffs.

E. F. B. Johnston, Q. C., for the defendants J. and C. Herring.

Martin, Q. C., for the defendants the Synod of the Diocese of Niagara.

M. S. Mercer, for the defendants Scholfield and Stevens.

Judgment was given dismissing the action without costs to the defendants the Herrings.

Judgment was reserved as to the costs of the other defendants.

Judgment was delivered on the 5th May, 1900.

BOYD, C.—I have reserved for further consideration the question of costs in an action to set aside a will. The plaintiffs allege that the defendants the Herrings confined and controlled the testator and procured the execution of the will by undue influence and fraudulent representation. They make parties defendants others interested, of whom two put in defences, but of a merely formal nature, submitting their rights to the Court, and these appeared by separate counsel at the trial. The active defence was taken up by the Herrings (one of whom was executor), who demonstrated that the complaint was unfounded, though there were circumstances which might, unexplained appear to be suspicious. For this reason, while I dismissed the action, I gave no costs against the plaintiffs. This is not objected to by the Herrings, but the other defendants ask costs out of the estate or out of the plaintiffs. One of these defences is the joint submission of two pecuniary legatees—the other is by the Synod of Niagara in respect of land devised to that body after the death of a life tenant. The will was made some two days before the death of the testator. There was another will, in like terms as to this property, made two years before, which had been destroyed. This was not adverted to in the pleadings, nor was it set up by the Synod in case the last will were nullified. No question was raised on the pleadings as to the right of the religious body to hold under the last will (see R. S. O. ch. 307, sec. 240). These defendants submitting their rights were, therefore, no more than mere formal defendants—certainly not in a more advantageous position than the intervener of the English procedure, who comes in that he may protect his rights.

Now, the rule is, that when the executors defend, supporting the will, as here, interveners in the same interest will not be allowed costs out of the estate: *Colvin v. Fraser* (1829), 2 Hagg. Eccl. at p. 368. See *Shaw v. Marshall* (1858), 1 Sw. & Tr. 129.

As to making the plaintiffs pay the costs of these defendants, the rule is not as in ordinary litigation. No charge of wrong-doing is made against these minor defendants, who are brought in as being more or less interested in the result. But the determination as to the incidence of the costs turns chiefly on the grounds of decision as to the merits between the main actors.

The special testamentary jurisdiction exercised by this Court is like that of the English Court of Probate. Of such Court it is the function to investigate the due execution of a will and the capacity of the maker. As said by Sir J. P. Wilde: "If fair circumstances of doubt or suspicion arise to obscure the question, a judicial inquiry is in a manner forced upon the Court. Those who are instrumental in bringing about and subserving this inquiry are not wholly in the wrong, even if they do not succeed. And so it comes that this Court has been in the practice on such occasions of deviating from the common rule in other Courts, and of relieving the losing party from costs if chargeable with no other blame than that of having failed in a suit which was justified by good and sufficient grounds for doubt:" *Mitchell v. Gard* (1863), 3 Sw. & Tr. at pp. 277, 278.

There is, perhaps, too much litigation in this Province growing out of disputed wills. It must not be fostered by awarding costs lightly out of the estate.

Parties should not be tempted into a fruitless litigation (as said Sir J. P. Wilde) by the knowledge that their costs will be defrayed by others. On the other hand, there is the contrasted danger of letting doubtful wills pass into probate by making the costs of opposing them depend upon successful opposition. It is only by the careful adjustment of costs that these opposite risks can be guarded against.

In the present case I think the proper rule to apply is to let the parties stand their own costs—as the litigation is not so clearly wrong as to justify the imposition of costs upon the plaintiffs, nor is it a proper case for burdening the

estate with the costs of the litigation: *Macaulay v. Kemp* (1880), 27 Gr. 442. I seek to apply the principles so clearly laid down in *Mitchell v. Gard*, 3 Sw. & Tr. 275, and in *Davies v. Gregory* (1873), L. R. 3 P. & D. 28. A late case, pertinent on both points before me, is *Browning v. Mostyn* (1897), 13 Times L. R. 184.

In reference to the memorandum submitted by the two legatees, I may say that if they assisted the defence of the chief defendants, it is but just that compensation should be made them in the administration of the estate, but I do not think that it is a proper matter to be dealt with as between co-defendants. The costs can be ordered out of the estate only when the estate is benefitted by the action, or the action or circumstances of the testator have involved the estate almost necessarily in litigation. This present action is of intermediate character.

The judgment will, therefore, stand as pronounced at the close of the trial.

SAWYER ET AL. V. ROBERTSON.

Jury Notice—Exclusive Jurisdiction of Chancery—R. S. O. ch. 51, sec. 103—Legal and Equitable Issues—Rule 551.

The plaintiffs' claim was to enforce a charge against the defendant's lands and for a personal order or judgment for immediate payment of the sum for which they asserted the charge :—

Held, not such an action as would have been, before the Administration of Justice Act of 1873, within the exclusive jurisdiction of the Court of Chancery, within sec. 103 of the Judicature Act, R. S. O. ch. 51.

There being, therefore, legal and equitable issues raised, and notice for a jury given, Rule 551 applied, and the action should be entered for trial at a jury sittings.

[May 10, 1900.—*Divisional Court.*]

AN appeal by the plaintiffs from an order of FALCONBRIDGE, J., in Chambers, dismissing their application to strike out a jury notice filed and served by the defendant. The action was brought to recover the price of a machine, and to enforce a lien upon land therefor. The defendant set up that he was drunk when he signed the lien agreement, and asked for rescission of it.

By the Judicature Act, R. S. O. ch. 51, sec. 103: "Subject to Rules of Court, all causes, matters and issues, over the subject of which prior to the Administration of Justice Act of 1873, the Court of Chancery had exclusive jurisdiction, shall be tried without a jury, unless otherwise ordered."

Rule 550.—"Where equitable issues are raised by the pleadings, they shall be heard and tried, and the damages, if any, incidental thereto, assessed by the Judge without the intervention of a jury; but he may order such issues to be tried or damages assessed by a jury.

Rule 551.—"Where both legal and equitable issues are raised, and notice for a jury has been given, or the action is one to which section 109 of the Judicature Act, 1895, applies, the action or proceeding shall (unless the Court or Judge otherwise orders, in cases to which said section 109 does not apply) be entered for trial at the proper jury sittings, and (subject to Rule 550 and sections 111 and 114 of the said Act) such issues shall be tried at

the same time, unless the Judge presiding at the trial otherwise directs."

Section 109 of the Act of 1895 is the same as sec. 102 of R. S. O. ch. 51 ; sec. 110 is the same as sec. 103.

The appeal was heard by a Divisional Court composed of MEREDITH, C. J., and MACMAHON, J., on the 2nd April, 1900.

Kirwan Martin, for the plaintiffs, contended that the cause of action was one within the exclusive jurisdiction of the Court of Chancery prior to the Administration of Justice Act, relying on *Farran v. Hunter* (1887), 12 P. R. 324. He also cited *Pawson v. Merchants Bank* (1885), 11 P. R. 72 ; *Lauder v. Didmon* (1894), 16 P. R. 74 ; *St. Margaret's Church v. Stephens* (1897), 33 C. L. J. 464 ; *McMahon v. Lavery* (1887), 12 P. R. 62 ; *Fox v. Fox* (1896), 17 P. R. 161 ; *Baldwin v. McGuire* (1893), 15 P. R. 305. He also contended that if the jury notice were allowed to stand at all, it should be ordered to stand merely as to such issues as were not equitable.

Glyn Osler, for the defendant. *Farran v. Hunter*, 12 P. R. 324, was decided before the change in the Rules. I refer to *Temperance Colonization Society v. Evans* (1887), 12 P. R. 48 ; *Fox v. Fox*, 17 P. R. at p. 163 ; and *Toogood v. Hindmarsh* (1897), 17 P. R. 446.

Martin, in reply. Rule 550 is just the same as it was when *Farran v. Hunter* was decided ; and the amendment to Rule 551 does not affect my contention.

The judgment of the Court was delivered on the 10th May, 1900, by

MEREDITH, C. J.—Appeal by the plaintiffs from an order of Mr. Justice Falconbridge, made on the 23rd March, 1900, dismissing their motion to strike out the jury notice given by the defendant.

The contention of the plaintiffs is, that their action is one which, before the Administration of Justice Act of

1873, was within the exclusive jurisdiction of the Court of Chancery, and therefore, according to the provisions of sec. 103 of the Judicature Act, should, unless otherwise ordered, be tried without a jury.

That contention is, in my opinion, not well founded.

By their statement of claim the plaintiffs sue not only to enforce their alleged charge against the defendant's lands, but also to obtain a personal order or judgment for immediate payment of the amount of their claim.

Such an action was not, before the Administration of Justice Act of 1873, within the exclusive jurisdiction of the Court of Chancery, and indeed until that Act was passed it was not competent for the Court of Chancery to give such a personal judgment as the plaintiffs claim, though the remedy for enforcement of the charge was to be obtained in that Court, and it had jurisdiction to order payment by the defendant of the residue of the claim which should not be satisfied by the realization of the security.

There being, therefore, legal and equitable issues raised, and notice for a jury given, Con. Rule 551 applies, and the action must be entered for trial at the proper jury sittings, when the legal issues can be tried by a jury, and the equitable issues by the Judge, or both by a jury or both by the Judge, as in the discretion of the Judge who presides at the trial may seem fit.

If we had come to a different conclusion, the action is one which, in the exercise of our discretion, we ought, in my opinion, to direct to be entered at the jury sittings, so that the Judge before whom the trial takes place may exercise his discretion as to the mode of trial to be adopted.

The appeal, therefore, fails and must be dismissed with costs to the defendant in any event.

APPLEBY ET AL. V. TURNER ET AL.

Leave to Appeal—Order Setting aside Judgment—Grounds of—Plausible Attack—Statement of Claim—Service by Posting—Irregularity—Delay—Discretion.

A Divisional Court of the High Court having set aside a judgment signed by the plaintiffs for default of defence in an action on a bond (*ante* 145), upon two grounds, viz., (1) that a motion for judgment was necessary, and (2) that the statement of claim had never been legally served upon the defendants, the posting up thereof in the office not being service because of the omission to file an affidavit of service of the writ of summons before doing so;—

Held, that leave to appeal should not be granted unless the plaintiffs could make a plausible attack upon both grounds, for if only one were demolished, the other would support the judgement, and leave to appeal will not be given merely to settle a point of practice the decision of which would not affect the judgment complained of.

And in this case the service of the statement of claim could not be supported, having regard to Rule 574, and it was in the discretion of the Court below to give effect to the objection to its regularity, notwithstanding the defendants' delay in moving against the judgment.

[May 15, 1900.—*Osler*, J.A.]

THIS was an application by the plaintiffs for leave to appeal to the Court of Appeal from the order of a Divisional Court (*ante* p. 145) reversing orders of the Master in Chambers and FALCONBRIDGE, J., and setting aside a judgment signed by the plaintiffs. The facts are stated in the former report and in the present judgment.

The application was heard by OSLER, J.A., in Chambers, on the 26th April, 1900.

W. E. Middleton, for the plaintiffs.

Hislop, for the defendants.

Judgment was delivered on the 15th May, 1900.

OSLER, J.A.—The action was upon a bond for security for the costs of an appeal to this Court, and the plaintiffs sought to recover thereon the taxed costs. The writ, which was not specially indorsed, had been personally served upon the defendants, who had not appeared, and the plaintiffs thereupon filed and posted up in the proper

office a copy of the statement of claim, pursuant to Rule 330, but did not file an affidavit of service of the writ, as required by Rule 574, until he came to sign judgment on default of statement of defence. The judgment then signed was a final judgment.

The defendants moved to set it aside on the grounds, *inter alia*, that the plaintiffs should have followed the practice established by the case of *Star Life Assurance Society v. Southgate* (1898), 18 P.R. 151, and should have moved for judgment under Rule 593 for the penalty of the bond and for assessment of damages on breaches assigned or to be suggested; and, secondly, that the judgment was irregular because the statement of claim had never been legally served upon the defendants, the posting up thereof in the office not being service because of the omission to file the affidavit of service of the writ before doing so.

The Divisional Court set aside the proceedings as defective on both grounds. The plaintiffs now move for leave to appeal, contending that the bond sued on is not such a bond as the Court was dealing with in the case in 18 P.R., and, therefore, that the practice laid down in that case was inapplicable; and, as to the second point, that Rule 574 had been substantially complied with by filing the affidavit of service of the writ at the time of signing judgment for default of plea, which, it was said, had been the universal practice ever since the Rule came into force.

It is said that the strength of a chain lies in its weakest link, and unless the plaintiffs can make a plausibly sound attack upon both of the grounds on which their judgment has been set aside, it would be useless to interfere, for if only one were demolished, the other would support the judgment, and leave to appeal is not given merely to settle a point of practice the decision of which would not affect the judgment.

It appears to me that it would be impossible to argue successfully in support of the regularity of the service of the statement of claim. Rule 574 has not been followed. That Rule provides for this very case:—"Where a defendant fails to appear the plaintiff before taking proceedings upon default of appearance shall file an affidavit of service of the writ," etc.

Now, the proceeding to be taken in this case upon default of appearance was to (file and) serve the statement of claim, and that service might be effected, the defendant having been served with the writ and not having appeared, by posting up a copy in the office—Rule 330.

That service was a necessary step—a proceeding—and the next proceeding required to be taken after default of appearance, and the Rule expressly prescribes that before it is taken the affidavit of service of the writ shall be filed. I do not agree that the judgment is the next proceeding, and that the filing of the affidavit at that time is sufficient. To hold that would be directly contrary to the language of the Rule. It may be that the reason for requiring the affidavit to be filed at the particular time is not apparent, as it is said that the officer has no control over the posting up of the proceedings, but neither that, nor the fact alleged that the practice hitherto always followed is that which was observed in this case, is a sufficient warrant for not complying with the plain condition of the Rule.

Morell v. Wilmott (1870), 20 C.P. 378, was in its day a notable instance of the application of that principle.

Rule 243 does not, that I can see, afford the plaintiff an argument. It relates to delivery of a statement of claim before or after appearance, and, therefore, where there has been no default. Rule 574 defines how the plaintiff must take his next proceeding after default, and if that proceeding be a statement of claim, it is the Rule to be observed, and is not inconsistent in any way with Rule 243.

Rule 574, in truth, preserves the old practice under the C.L.P. Act, sec. 56.

I have not overlooked the suggestion that the delay in moving against the judgment was so great that the defendants should not have been allowed to raise the objections of irregularity in the service. I think, however, it was in the discretion of the Court to give effect to it, notwithstanding the delay.

As, therefore, there seems to be no ground for thinking that the judgment of the Divisional Court on this point is wrong (and I do not wish to be understood as entertaining any opinion opposed to the judgment on the other point), leave to appeal must be refused. Costs follow.

SEGSWORTH V. MCKINNON.

Venue—Writ of Summons—Indorsement—Election—Rules 138 (2), 529.

Where in the special indorsement of his writ of summons the plaintiff names a place of trial, he is not at liberty to change by naming another place in his statement of claim. Rule 529 must be read subject to the provision of Rule 138 (2).

[April 23, 1900.—*The Master in Chambers.*]

[May 15, 1900.—*Meredith, C.J.*]

APPLICATION on behalf of the defendant to strike out that part of the plaintiff's statement of claim which named Stratford as the place of trial, on the ground that in his writ of summons the plaintiff had named Toronto as the place of trial, and was not at liberty to change it.

The motion was heard by the Master in Chambers on the 23rd April, 1900.

W. H. Blake, for the defendant.

R. S. Robertson, for the plaintiff.

Judgment was delivered on the same day.

THE MASTER IN CHAMBERS.—For the plaintiff it is contended that it is his duty under Rule 529 to name the place of trial in his statement of claim. I am of the opinion that that is so, but, having already placed it in the indorsement of his writ at one place—and he was permitted to do so by the Rules and forms, it being a specially indorsed writ—has he the privilege of changing it from the place so named in the writ of summons to another place, by the statement of claim?

In *Bull v. North British C. I. Co.* (1885), 10 P.R. 622, it was held—following decisions therein referred to—that the venue could not be changed under an order to amend. Had the plaintiff desired to amend the indorsement on the writ of summons—as is frequently the case in other particulars—he could, no doubt, have obtained such an order before serving the writ, or upon notice after its service. I am of opinion that it was improper without an order to have changed the place of trial as was done in the present case. The venue shall remain at Toronto as originally laid. Costs to the defendant in any event.

The plaintiff appealed from the Master's order, and his appeal was heard by MEREDITH, C.J., in Chambers, on the 11th May, 1900.

The same counsel appeared.

Judgment was delivered on the 15th May, 1900.

MEREDITH, C.J.—Appeal by the plaintiff from an order of the Master in Chambers directing the statement of claim to be amended by changing the place of trial named in it from Stratford to Toronto.

The writ was specially indorsed, and in the special indorsement the plaintiff named as the place of trial Toronto. This was, I think, an election by the plaintiff as to the place of trial which he was not at liberty to change in his statement of claim. It is true that by Con. Rule 529 the plaintiff is required in his statement of claim to name the county town at which he proposes the action is to be tried; but the Rule must be read with Con. Rule 138, sub-sec. 2, which requires the indorsement to contain a statement as to the place of trial, and subject to that provision.

Where the defendant intimates that he does not require a statement of claim to be delivered, it is clear that the place of trial must be that named in the indorsement on the writ, and I do not see why, if this be so, the necessary result is not, that the election thus made is a conclusive election for the purpose of the action.

The appeal must be dismissed with costs to the defendant in any event.

PRITCHARD v. PATTISON.

Evidence—Motion—Security for Costs—Nominal Plaintiff—Insolvency.

The plaintiff, being examined by the defendant as a witness upon a motion made by the defendant to set aside the proceedings and dismiss the action or for security for costs, on the ground that the plaintiff had no interest in the company on behalf of whose shareholders as well as himself he was suing, was asked what means he had of satisfying the costs in the action:—

Held, that the defendant could not interrogate the plaintiff as to his financial position until, at least, a *prima facie* case had been made out that he was only the nominal, and not the real and substantial plaintiff; and the evidence given upon the motion before the examination of the plaintiff showed that he had a substantial interest.

[June 14, 1900.—*Rose, J.*]

AN appeal by the plaintiff from an order of the Master in Chambers requiring the plaintiff to attend at

his own expense for re-examination and to answer questions which he refused to answer upon his examination as a witness upon a pending motion by the defendant for security for costs, and in default dismissing the action: such questions being as to the plaintiff's means of satisfying the costs of the action, in case he should be ordered to pay costs to the defendant. The facts are stated in the judgment.

The appeal was heard by ROSE, J., in Chambers, on the 11th June, 1900.

F. J. Roche, for the plaintiff.

P. H. Drayton, for the defendant.

Judgment was delivered on the 14th June, 1900.

ROSE, J.—The defendant moved to set aside the proceedings and dismiss the action, on the ground that the plaintiff had no interest in the company on behalf of whose shareholders, as well as of himself, he was suing, and the notice further stated that an order for security for costs would be asked for. The material referred to in the notice of motion to be used in its support was the affidavit of the defendant, the writ of summons, the examination of the plaintiff, to be taken, and further affidavits to be filed.

The notice of motion was returnable on the 11th May, and the motion was adjourned until the 15th. On the 15th May the defendant's affidavit was first filed, stating that he had searched in the books of the company, and that the plaintiff was not at the time of the issue of the writ a shareholder in the company. The affidavit of the plaintiff was filed on the same day, stating that he was a holder of ten shares of paid up stock, purchased on or about the 25th April, 1900, and the stock certificates were produced as exhibits.

On the 28th [day of May the plaintiff examined the president and secretary of the company, and the examinations, I understand, were brought in before the Master. Those examinations shewed that the plaintiff was holder in his own right of the shares referred to, and not as a trustee for the company or any shareholder in the company.

Then, as I understand it, the motion was adjourned to allow the defendant to examine the plaintiff, and on that examination the plaintiff was at once interrogated as to the amount of his income, whether there were any executions against him, as to what assets he had, and what means he had of satisfying the costs in the action. The examiner ruled that the questions were not proper, and an adjournment was had to enable the defendant to move before the Master for an order that the plaintiff do attend before the examiner at his own expense and answer the questions he refused to answer, and in default thereof that the action be dismissed with costs.

Upon that motion the order appealed against was made, requiring the plaintiff to attend and to answer all proper questions that might be asked of him as to what means he is possessed of to satisfy the costs of this action in case he is ordered to pay the same, and ordering that, in default of his answering the same, the action be, and the same is hereby, dismissed with costs.

I fail to find any material upon which the motion for security for costs could properly be based, and I think the defendant was in error in interrogating the plaintiff as to his financial position until at least a *prima facie* case had been made out that he was only the nominal, and not the real and substantial, plaintiff, suing in his own right and for his own benefit and for the benefit of all other shareholders that might choose to avail themselves of the beneficial result of the action if it result in the plaintiff's favour. It was premature, I think, to seek to know

what the financial position of the plaintiff was until it was made to appear that if he had no means out of which to satisfy the costs of the action, an order for security for costs could be made. On the material before me, assuming that the plaintiff is a man without means, I think there is no ground for an order for security for costs, no material upon which such an order could possibly be granted, and, therefore, the inquiry into the plaintiff's financial position was not pertinent.

The appeal must be allowed and the order of the Master set aside and the application of the defendant dismissed with costs of the appeal and of the motion to the plaintiff in any event of the cause.

WHITEWOOD V. WHITEWOOD.

Payment into Court—Infant's fund—Trustee—Discretion—Costs—Taxation—Interlocutory motion—Affidavits.

The defendant, having in her hands a fund to the benefit of which the plaintiff, an infant, was entitled, asserted that, by the terms of the trust upon which she held it, she had a discretion as to the application of it for the benefit of the plaintiff. She nevertheless paid the money into a bank to her own credit as trustee for the plaintiff, and agreed that she would not use it except for his benefit, and would pay it to him at majority :—

Held, that the defendant was a mere trustee for the plaintiff, without the discretion which she contended for ; and a summary order (made before delivery of statement of claim in an action to recover the fund and for an injunction) requiring the defendant to pay the fund into Court, and thereupon perpetually staying the action, was affirmed.

Re Humphries, Mortimer v. Humphries (1899), 18 P.R. 289, approved. Where an interlocutory motion was dismissed upon preliminary objections :—

Held, that the taxing officer had a discretion to disallow to the party opposing it the costs of affidavits filed in answer to it.

[March 16, 1900.—*Armour*, C. J.]

[May 14, 1900.—*Divisional Court*.]

MOTION by the plaintiff for an order requiring the defendant to pay into Court certain moneys in her hands,

the subject of a trust in favour of the plaintiff, and for a stay of proceedings. The motion was made before delivery of a statement of claim in the action, but after a motion for an interim injunction had been disposed of. The moneys in question were the fruits of an insurance policy upon the life of the deceased father of the plaintiff, who was an infant suing by his next friend. The defendant was the mother of the deceased, and the moneys were paid to her by the insurance company. The action was for recovery of the fund and for an injunction. The defendant admitted a trust in favour of the plaintiff, but asserted that she had control over the fund and a discretion as to its disposal.

The motion was heard by ARMOUR, C. J., in Chambers, on the 16th March, 1900.

Eyre, for the plaintiff.

Carey, for the defendant.

ARMOUR, C. J., made an order upon the defendant for payment of the fund into Court, and directing that thereupon the action should be perpetually stayed.

In the same case, and on the same day, *Carey*, for the defendant, appealed from the ruling of the junior taxing officer at Toronto, upon the taxation of the defendant's costs of a motion for an interim injunction (which was dismissed with costs), that the costs of certain affidavits which were filed by the defendant upon the motion, but not recited in the order dismissing it, should not be allowed to the defendant. There was in the order a general recital of the reading of "the material filed," which was said to have been inserted in the order by the officer who settled it, in lieu of a specific recital of the affidavits in the minutes of the order as prepared by the defendant's solicitor.

Eyre, for the plaintiff, opposed the appeal.

Judgment was delivered on the same day.

ARMOUR, C. J.—This appeal must be dismissed with costs.

Morgan on Costs, p. 486, and the authorities therein cited, fully support the taxing officer's course, with which I entirely agree.

The defendant appealed from both of these orders, and her appeal was heard by a Divisional Court composed of MEREDITH, C. J., and MACMAHON, J., on the 2nd April, 1900.

Carey, for the defendant, contended that the Court will not order payment in of a fund in the hands of a trustee, where there is a discretion, citing *Talbot v. Marshfield* (1864), 2 Dr. & Sm. 285. As to the costs of the affidavits, he urged that the defendant should not be prejudiced by the form of the order.

Eyre, for the plaintiff, cited, as to the order for payment into Court and staying proceedings, Rule 616; *Freeman v. Cox* (1878), 8 Ch. D. 148; *Hollis v. Burton*, [1892] 3 Ch. 226; *Neville v. Matthewman*, [1894] 3 Ch 345; *Nutter v. Holland*, *ib.* 408; *Wilberforce Educational Institute v. Holden* (1887), 17 O. R. 439; *Re Benson*, [1899] 1 Ch. 39; and as to costs, *Catholic Printing and Publishing Co. v. Wyman* (1862), 11 W.R. 49; Morgan on Costs, 2nd ed., p. 486; Holmsted's Chancery Orders, p. 75; Scott's Bill of Costs, 10th ed., p. 80.

Carey, in reply, on the question of payment in. All the cases cited are cases of executors, where there was nothing to do but pay over the money. Cases such as *Re Humphries*, *Mortimer v. Humphries* (1899), 18 P.R. 239, and *Re Braithwaite* (1882), 21 Ch. D. 121, do not govern.

The judgment of the Court was delivered on the 14th May, 1900, by

MEREDITH, C.J.—The defendant appeals from an order of the learned Chief Justice of the Queen's Bench, made

on the 16th March 1900, directing the defendant to pay into Court the fund in question in the action, and that thereupon the action should be perpetually stayed, and from another order of the Chief Justice, made on the same day, dismissing the defendant's appeal from the taxation of the costs to which she is entitled under an order made by my brother Street on the 27th February, 1900.

The contention of the appellant's counsel on the first appeal was that, inasmuch as, as he contended, the fund in question was held by the defendant upon a trust giving her a discretion as to the application of it for the benefit of the plaintiff, who is an infant, it was not in accordance with the practice of the Court to interfere with the exercise of that discretion by directing the money to be paid into Court.

What would have been the result had it been clear that by the terms of the trust the defendant had the discretion which I have mentioned vested in her, it is, I think, unnecessary to consider, for upon the uncontradicted evidence it appears that, difficulties having arisen as to the defendant's right to the money, it was finally arranged that the fund should be paid into the Dominion Bank to the credit of the defendant as trustee for the plaintiff, and that the defendant would not use the fund except for the benefit of the plaintiff, and would, upon his attaining 21, pay it to him, and the money was accordingly paid into the Dominion Bank to the credit of the defendant as trustee for the plaintiff, and it must be taken therefore that the defendant is a mere trustee for the infant without having the discretion which she claims to have as to the application of the fund for his benefit.

This being the condition of matters, the order directing the fund to be paid into Court was properly made, and the appeal from it must be dismissed: *Re Humphries, Mortimer v. Humphries* (1899), 18 P.R. 289, and the cases referred to in it.

The second appeal also, in my opinion, fails.

Whether or not the omission to recite the affidavits in the order was fatal to the claim of the defendant to have the costs of them taxed to her, the taxing officer certainly had a discretion to disallow the costs of unnecessary affidavits, and in the exercise of that discretion, as well as because they were not recited in the order, he did disallow the costs of those in question. The motion in respect of which the costs were ordered to be paid failed because the action was brought without the written authority of the next friend being first filed, and because no motion having been made on the 15th February, 1900, (the date up to which the injunction which it was sought by the motion to continue was in force) to continue it, the injunction thereby became dissolved.

We cannot say that, in these circumstances, the taxing officer erred in disallowing the costs of the affidavits filed in opposition to the motion, and which were not read owing to the preliminary objections to which I have referred being taken and being given effect to.

The dismissal of the appeals should be with costs to be paid by the appellant.

RE TOWNSHIP OF METCALFE AND TOWNSHIPS OF ADELAIDE
AND WARWICK.

RE TOWNSHIP OF COLCHESTER NORTH AND TOWNSHIP OF
GOSFIELD NORTH.

Costs—Scale of—Appeal from Judgment of Drainage Referee.

Having regard to secs. 111, 112, and 113 of the Municipal Drainage Act, R.S.O. ch. 226, and no tariffs of fees having been framed thereunder, the tariff of the County Courts applies, not only to proceedings before the Drainage Referee, but to appeals from his decisions; and therefore the basis of taxation of the costs of an appeal to the Court of Appeal from the decision of the Referee should be the County Courts tariff.

[May 7, 1900.—*Meredith, C.J.*]

[July 3, 1900.—*Divisional Court.*]

AN appeal by the corporation of the township of Metcalfe from the taxation of the costs of the corporations of the townships of Adelaide and Warwick incurred in the Court of Appeal; and an appeal by the corporation of the township of Gosfield North from the taxation of the like costs of the corporation of the township of Colchester North.

The proceedings in both cases were instituted under sec. 93 of the Municipal Drainage Act, R.S.O. ch. 226, by notice, and not by action. In each case there was an appeal to the Court of Appeal from the decision of the Drainage Referee under sec. 110 of the Act, and such appeal having been determined by the Court of Appeal in favour of the townships of Adelaide and Warwick in the one case, with costs payable to them by the township of Metcalfe, and in favour of the township of Colchester North in the other case, with costs payable to them by the township of Gosfield North, the taxing officer taxed these costs upon the High Court and Court of Appeal scale. The judgment of the Court of Appeal did not define the scale of costs, but simply allowed "costs of the appeal" to the successful party.

The appeal in the first case was heard by MEREDITH, C.J., in Chambers, on the 27th April, 1900.

Folinsbee, for the corporation of Metcalfe.

C. A. Moss, for the corporations of Adelaide and Warwick.

Judgment was delivered on the 7th May, 1900.

MEREDITH, C.J.—Appeal from the taxation by the senior taxing officer of the costs in the Court of Appeal of an appeal under the Drainage Act which was dismissed with costs.

The costs were taxed upon the High Court scale, and the appeal was rested upon the ground that, according to the provisions of the Act, County Court costs only are taxable, even for the proceedings in the Court of Appeal.

It was conceded on the argument that ever since the Act was passed it has been the practice to tax the costs in the Court of Appeal upon the High Court scale; and while I am not free from doubt as to what the proper construction of the statute is, if the matter were *res integra*, I do not think it would be proper to disturb this practice, which has so long and uniformly prevailed, and which I think is a practice that would have been adopted if the power to pass Rules and to frame a tariff, which is conferred by the Act, had been exercised.

There is a great deal to be said in favour of the view that the Legislature had not in contemplation, in providing that the scale of costs should be that of the County Court, the costs of proceedings in the Court of Appeal, and I decide the case against the appellants because I am not able to say that the practice which has prevailed is wrong.

I dismiss the appeal with costs on the High Court scale.

The corporation of the township of Metcalfe appealed from the order of MEREDITH, C.J.; and the appeal of the

corporation of the township of Gosfield North was referred by ROSE, J., to a Divisional Court for hearing.

Both appeals were heard by a Divisional Court composed of ARMOUR, C.J., and STREET, J., on the 4th June, 1900.

Riddell, Q.C., for the corporation of the township of Gosfield North, and *Folinsbee*, for the corporation of the township of Metcalfe, contended that the costs should be taxed according to the tariff applicable to County Court appeals, or, if not, that there was no tariff upon which they could be taxed.

Langton, Q.C., for the corporation of the township of Colchester North, and *C. A. Moss*, for the corporations of the townships of Adelaide and Warwick, opposed the appeal.

McCulloch v. Township of Caledonia (1899), 19 P.R. 115, *Moke v. Township of Osnabruck* (1900), *ib.* 117, *Fewster v. Township of Raleigh* (1895), 31 C.L.J. 287, 15 C.L.T. Occ. N. 137, *Re Township of Raleigh and Township of Harwich* (1898), 18 P.R. 73, *Holmes v. Bready* (1898), *ib.* 79, 59 Vict. ch. 18, sec. 15 (O.), were referred to.

On the 3rd July, 1900, the judgment of the Court was delivered by

STREET, J.—With the greatest respect, I feel bound to differ from the opinion of the Chief Justice of the Common Pleas, against which this appeal is brought, because I think the question is governed by a statute too clear to be disregarded.

Section 111 of ch. 226 gives to the Judges of the Supreme Court of Judicature for Ontario the same authority to make “rules with respect to proceedings before the Referee and appeals from him as they have with respect to proceedings under the Judicature Act.”

Section 112 gives to the Drainage Referee power (subject to any rules framed by the Judges under sec. 111) to frame rules regulating the practice and procedure before

him, and to frame tariffs of fees; and by sub-sec. (2) it is provided that "such rules and tariffs, whether made by the Judges or the Referee, shall be published in the *Ontario Gazette* and shall thereupon have the force of law," &c.

Section 113 then provides that "until other provisions are made under the last two preceding sections the tariff of the County Court shall be the tariff of costs and of fees and disbursements for solicitors and officers under this Act," &c.

I have been unable to find anything subsequently enacted which impairs the effect of sec. 113. The Consolidated Rules which came into effect on the 1st September, 1897, contain no reference to proceedings under the Municipal Drainage Act, and therefore sec. 15 of ch. 18 of 59 Vict. (O.), to which we were referred, does not affect the matter. The unrepealed law upon the statute book therefore provides in plain terms that until the Judges by Rule make some other provision and publish it in the *Ontario Gazette*, the tariff of the County Courts shall apply not only to proceedings before the Referee but to appeals from him. It was argued that the Consolidated Rules of 1897 have been held to govern appeals under the Drainage Act, and that therefore the tariff provided by those Rules for the costs of appeal to the Court of Appeal governs the costs of Drainage appeals. The Consolidated Rules, however, only govern Drainage appeals by reason of their analogy to High Court appeals, and only in so far as they are applicable; but here we have a distinct statutory provision with regard to costs which forbids our applying any tariff but that of the County Courts until another tariff has been framed and published in the *Gazette*—and that has not been done. For these reasons I am of opinion that the appeal should be allowed, with costs here and below, and that the bills of costs should go back to the taxing officer with instructions to tax them using the County Court tariff as the basis of taxation.

GEARING V. ROBINSON ET AL.

Costs—Mechanic's Lien—Appeal—R.S.O. ch. 153, secs. 41, 42, 45.

Sections 41 and 42 of the Mechanics' and Wage-Earners' Lien Act, R.S.O. ch. 153, limiting "the costs of the action under the Act" to twenty-five per cent. of the judgment, besides actual disbursements, do not apply to the costs of an appeal from the decision of the Judge or officer trying the action.

Semble, that the costs of such an appeal are within the scope of sec. 45.

[July 13, 1900.—*Meredith*, C.J.]

AN appeal by the plaintiff from the taxation of the costs of the defendants A. McGee and others, who were successful upon an appeal to the Court of Appeal from the judgment of the Judge of the County Court of York in a proceeding to establish a mechanic's lien, and who were allowed by the Court of Appeal costs of the appeal and of the action, against the plaintiff.

The appeal was heard by MEREDITH, C.J., in Chambers, on the 10th July, 1900.

Du Vernet, for the plaintiff.

W. N. Ferguson, for the defendants A. McGee and others.

Judgment was delivered on the 13th July, 1900.

MEREDITH, C.J.—The question raised by this appeal is as to the proper construction of the provisions of the Mechanics' and Wage-Earners' Lien Act (R.S.O. ch. 153) limiting the amount of costs to be taxed against an unsuccessful plaintiff when costs have been awarded against him.

The plaintiff succeeded in obtaining at the trial of the action, before the senior Judge of the County Court of the county of York, a judgment establishing his lien as against the interest of the respondents in the land in question,

but upon appeal to the Court of Appeal that judgment was reversed, the appeal being allowed with costs, and the action as against the respondents dismissed with costs.

The costs of the appeal have been taxed at \$284.19, and the other costs awarded to the respondents at \$187.40, making together \$471.59, a sum in excess of 25 per cent. of the claim of the plaintiff (which was \$941.20) and actual disbursements.

The contention of the appellant is that the statutory percentage is applicable to all the costs awarded to the respondents, including those of the appeal which the appellant is directed to pay.

Sections 31, 41, 42, and 45 are the sections which it is necessary to consider.

Section 31 gives a right of action to realize the liens created by the Act, and makes the ordinary procedure of the High Court applicable, except where it is varied by the Act.

Section 41 deals with the costs awarded to the plaintiffs or successful lienholders, and provides that the costs of the action under the Act awarded by the Judge or officer trying the action to them, shall not exceed in the aggregate an amount equal to twenty-five per cent. of the judgment, besides actual disbursements, and requires that these costs "be apportioned and borne in such proportion as the Judge or other officer who tries the action may direct."

Section 42 deals with costs awarded against the plaintiff or other persons claiming the lien, and provides that they shall not exceed an amount in the aggregate equal to twenty-five per cent. of the claim of the plaintiff and other claimants, besides actual disbursements, and requires that the costs "be apportioned and borne as the Judge or said other officer may direct."

Section 45 provides that the costs of applications and orders made under the Act and not otherwise provided for

shall be in the discretion of the Judge or officer "to whom the application or order is made."

These provisions certainly leave room for doubt as to what was intended by the Legislature, but upon the whole I have come to the conclusion that the contention of the appellant is not well founded.

It is true that an appeal is a step in the cause, and that in one sense the costs of it form part of "the costs of the action;" but, reading all the provisions of the Act dealing with the question of costs, I am of opinion that those words are not used in that sense in secs. 41 and 42.

The words "awarded by the Judge or officer trying the action" in sec. 41 shew, I think, that the costs up to and including the trial are those intended to be dealt with, and there is much reason in excluding the costs of an unsuccessful appeal from the judgment pronounced at the trial awarded against the appellant from the rule which the section lays down. It is true that in this case no costs were awarded by the trial Judge to the respondents because his decision was against them, but on appeal that decision was reversed, and the judgment which ought to have been pronounced by him was given by the Court of Appeal, which dismissed the action as against the respondents with costs.

Section 42 must be read as dealing with costs awarded by the Judge or officer trying the action. The concluding words of the section as to his apportioning these costs clearly shew this to be intended, though even without them the construction to be placed upon the language of the section would probably be the same.

It is not in this view necessary to consider the effect of sec. 45, though such consideration as I have given to its provisions leads to the conclusion that the costs of the appeal are within the scope of them.

The appeal is dismissed with costs.

BABCOCK V. STANDISH.

Costs—Scale of—County Court—Payment into Court—Sum within Competence of Division Court—Acceptance by Plaintiff—Order for Set-off—Finality—Appeal.

The plaintiff in an action in a County Court claimed \$140, the balance alleged to be due upon the sale of a chattel, and the defendant brought into Court \$95 in full of the plaintiff's cause of action, which the plaintiff accepted in due time. The Judge of the County Court thereupon made a summary order allowing the defendant to set off his costs incurred in the County Court in excess of such costs as he would have incurred in a Division Court against the costs of the plaintiff, and to enter judgment and issue execution for the excess, if any, of the costs of the defendant over and above the costs of the plaintiff:—

Held, that the plaintiff was entitled to tax his costs of the action according to the County Court scale, irrespective of the amount paid into Court and accepted by him in satisfaction of his claim; and the plaintiff being entitled to his costs by the express provision of Rule 425 (which is not qualified by Rule 1130), they were not subject to the discretion of the Judge.

Held, also, that the order of the Judge was in its nature final, and therefore appealable under sec. 52 of the County Courts Act, R.S.O. ch. 55.

[July 3, 1900.—*Divisional Court.*]

APPEAL from an order of the Judge of the County Court of the county of Bruce.

The plaintiff brought his action in that Court to recover \$140, being the balance alleged to be due upon the sale of a piano to the defendant for \$185, after allowing a payment of \$35 and a set-off of \$10.

The defendant brought into Court with his statement of defence the sum of \$95 in full of the plaintiff's cause of action, and gave notice on the 23rd April, 1900, that he had paid that sum into Court. On the 26th April the plaintiff filed and served notice of acceptance of the money paid in, in satisfaction of his causes of action. On the 10th May, 1900, the Judge of the County Court, upon the application of the defendant's solicitor, notice of the application having been served on the plaintiff's solicitor, and upon an affidavit of the facts above set forth, made an order "that the defendant be allowed to set off his costs

herein incurred by him in this Court in excess of such costs as he would have incurred if sued in the Division Court, against the costs of the plaintiff herein, and to enter judgment and issue execution for the excess, if any, of said costs of the defendant over and above the costs of the plaintiff."

The plaintiff appealed from this order to a Divisional Court, and his appeal was argued on the 4th and 7th June, 1900, before ARMOUR, C.J., FALCONBRIDGE and STREET, JJ.

W. H. Blake, for the appellant.

W. E. Middleton, for the defendant.

Judgment was delivered on the 3rd July, 1900.

STREET, J.—The plaintiff relies upon Rule 425 * as giving him an absolute right to recover his costs of the action upon the scale of the Court in which it was brought under the simple facts of this case.

The defendant answers, first, that the order of the learned County Court Judge is not appealable; and second, that if appealable, it is right and should not be disturbed, being a proper exercise of a judicial discretion.

In my opinion, the rule to be applied is that for which the plaintiff contends.

Where a plaintiff takes out of Court, in satisfaction of his claim, a sum of money paid in for the purpose by the defendant, there is no express or implied admission that he is not entitled to all that he claimed. He merely accepts the sum paid in rather than proceed further with the action, and Rule 425 offers him his costs as an inducement to this termination of the litigation. If the plaintiff's

* 425. When the plaintiff takes out money in satisfaction of all the causes of action he may tax his costs of the action and sign judgment therefor, unless the defendant pays them within forty-eight hours after taxation.

claim were for a sum a few cents more than could have been sued for in the Division Court, and the defendant had paid in a sum just within the jurisdiction of the Division Court, it would be hard that the plaintiff should be obliged either to go down to trial, or else be deprived not only of his costs, but probably of a considerable part of his claim, by taking the sum offered and taxing Division Court costs only, with a set-off such as has been ordered here. This view of the matter is very clearly put by Coleridge, J., in *Chambers v. Wiles* (1855), 24 L.J.N.S. Q.B. 267, decided under the practice then in force.

It is contended by the respondent that Rule 1130 applies to and qualifies the absolute right to costs which would otherwise be given to the plaintiff by Rule 425. Rule 1130 is as follows: "Subject to the provisions of the Judicature Act, 1895, and to the express provisions of any statute heretofore or hereafter passed, the costs of and incidental to all proceedings in the Supreme Court shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent the costs shall be paid."

In *Broadhurst v. Willey*, [1876] W.N. 21, it was decided by Mr. Justice Lindley that a Rule similar to our Rule 425 was governed by a Rule similar to our Rule 1130, and that there was therefore a discretion in a Judge sitting in Chambers to make an order refusing the plaintiff any costs.

That case is not reported, so far as I have been able to find, anywhere but in the Weekly Notes and in the Solicitors' Journal of 22nd January, 1876 (20 Sol. J. 240.) It does not seem to have found its way into any of the regular reports, and it is not referred to in any of the subsequent cases. It is inconsistent with the opinion expressed by Cockburn, C.J., and Mellor, J., in *Greaves v. Fleming* (1879), 4 Q.B.D. 226, where they say that a plaintiff taking out money within four days under Order

XXX., Rule 4 (which was identical with our Rule 425), acquired an absolute right to costs, but that if he took it out after the four days he was subject to the discretion of the Judge as to his costs. The right to costs is spoken of as a vested right, in cases coming within that Order, also in *Langridge v. Campbell* (1877), 2 Ex. D. 281, at p. 286, by Kelly, C.B. See also *Lomer v. Waters*, [1898] 2 Q.B. 326, and *McSheffrey v. Lanagan* (1887), 20 L.R. Ir. 528.

In 1883 the English Order XXX., Rule 4, was changed, and now stands as Order XXII., Rule 7, and expressly gives a discretion to the Court or a Judge over the costs in such a case as the present, so that the subsequent decisions do not help the consideration of the present question.

Going back to the consideration of the effect to be given to our Rule 1130, it is to be observed that that Rule is not absolute, but is expressly "subject to the provisions of the Judicature Act, 1895." The provisions referred to seem to be those contained in sec. 119 of the present Judicature Act, R.S.O. ch. 51, which is as follows: "*Subject to Rules of Court and to the express provisions of any statute, the costs of and incidental to all proceedings in the Supreme Court of Judicature shall be in the discretion of the Court or Judge,*" etc.

The effect of Rule 1130, read with Rule 1216, is *inter alia* to make this statute applicable to proceedings in the County Court, and Rule 1130 is qualified by the reference in the statute to the Rules of Court, so as to make it subject to the Rules of Court as well as to the provisions of the Judicature Act. In other words, it is equivalent to this: "Subject to anything to the contrary contained in these Rules * * * the costs of and incidental to all proceedings in the Supreme Court shall be in the discretion of the Court or Judge," etc., etc. The provision in Rule 425 giving an absolute right to costs to a plaintiff who brings himself within the Rule must, therefore, be taken to be an exception to Rule 1130.

The learned County Court Judge treated Rule 1130 as being applicable to the case and made the order complained of in accordance with the directions of that Rule. The difficulty in the way of applying that Rule (supposing it to be applicable to cases where there has been no trial) is that it has not here been established in any way that this action was of the proper competence of the Division Court, for, as I have endeavoured to point out, the mere fact that the plaintiff accepts a smaller sum paid into Court in preference to going on with his action does not establish that he would not have recovered his full claim had he gone on and tried it out. The same difficulty stands in the way of holding Rule 1133 applicable.

The result, in my opinion, is, that the right to costs given by Rule 425 to a plaintiff bringing himself strictly within it as this plaintiff has done, is an absolute, vested right to tax his costs upon the scale applicable to actions properly brought in the Court in which his action is brought, and that no Court or Judge has any discretion to interfere with the right.

I think a further result of this conclusion is that the objection that no appeal lies from the order cannot be sustained. The plaintiff's right to recover his costs is as absolute as his right to recover his debt. The order of the learned Judge, if supported, would be a final disposition of this right, and is therefore appealable under sec. 52 of ch. 55, R.S.O. The present case is distinguishable from the case cited to us of *Blakey v. Latham* (1889), 43 Ch. D. 23. There an action had been dismissed with costs, and the plaintiff obtained an order directing that the costs payable to the defendant should be set off against certain costs of another action payable to the plaintiff by the defendant and another, subject to any lien in favour of one Green, who was the solicitor for the defendant in the first mentioned action, for his costs. Green appealed from the order, and it was held that, as regards the time for

appealing, the order was interlocutory, and not final, being only an order for working out the rights given by a final judgment. The ground of the decision is thus shortly put by Cotton, L.J. (p. 25): "Any order, in my opinion, which "does not deal with the final rights of the parties, but "merely directs how the declarations of right already "given in the final judgment are to be worked out, is "interlocutory." The order in the present case is not intended to work out the rights of the plaintiff under Rule 425, the terms of which fix and define his rights upon the final determination of the action, but to substitute for the terms of the Rule other rights as those to which he is entitled upon the final determination of the action.

The appeal must therefore be allowed with costs, and the order appealed against must be set aside with costs.

ARMOUR, C.J.—The plaintiff, having elected within the time limited by the Rule to take out the money paid into Court in satisfaction of his claim, was entitled to tax his costs of the action according to the scale of fees applicable to the County Court irrespective of the amount paid into Court and accepted by him in satisfaction of his claim; and the plaintiff being entitled to his costs by the express provision of the Rule, they were not subject to the discretion of the Judge.

The order made by the learned Judge was wholly unauthorized, and, being in its nature final and not merely interlocutory, was subject to appeal and must be set aside with costs.

FALCONBRIDGE, J.—I agree in the result.

GIRARDOT V. WELTON ET AL.

Costs—Counterclaim—Relief obtainable without Cross-action—Set-off—Rules 1164, 1165—Order of Revivor.

Decision of ARMOUR, C.J., *ante* p. 162, as to costs taxable by the plaintiff upon a judgment dismissing a so-called counterclaim, affirmed.

Held, also, that such costs were interlocutory costs within the meaning of Rule 1165; and, if not, that they were costs falling within Rule 1164, and subject to the discretion of the taxing officer in setting them off against the defendant's costs of the action.

Held, also, that costs of an order of revivor obtained by the plaintiff after judgment in order to tax his costs, should be taxed to him and added to his other costs and set off against the defendant's costs.

[May 26, 1900.—*Divisional Court.*]

AN appeal by the plaintiff from an order of ARMOUR, C.J., in Chambers, dismissing an appeal by the plaintiff from the taxation of costs by the local Master at Windsor. The decision of ARMOUR, C.J., as to the principal point, viz., the costs of what the defendant Welton called his "counterclaim," is reported *ante* p. 162. The other points which were in question upon both appeals and which are referred to in the judgment *infra*, were as to whether the Master was right in setting off *pro tanto* the costs taxed to the plaintiff against those taxed to the defendant, and whether the Master was right in refusing to tax to the plaintiff the costs of an order of revivor obtained by him after judgment (upon the death of the defendant Welton) for the purpose merely of taxing costs.

The appeal was heard by a Divisional Court composed of BOYD, C., FERGUSON and ROBERTSON, JJ., on the 8th May, 1900.

F. E. Hodgins, for the plaintiff.

S. White, for the defendant by revivor.

Judgment was delivered on the 26th May, 1900.

BOYD, C.—By the Ontario practice in a redemption suit the defendant has the right either to have the bill

dismissed in case of failure to pay or to obtain a final order of the foreclosure against the plaintiff: Rule 391*. The claim, in this action of redemption, on the part of the defendant for foreclosure, was in no sense a counterclaim, but relief appropriate to the proceedings in a mortgage action. I, therefore, agree with the judgment in appeal.

The costs allowed to the plaintiff when this claim of foreclosure was dismissed, are within the meaning of interlocutory costs under Rule 1165†: see cases collected in *Clarke v. Creighton* (1890), 14 P.R. at p. 37, and *Elgie v. Butt* (1899), 18 P.R. 469. Were this not so, these costs fall within the provisions of Rule 1164‡ and are subject to the discretion of the taxing Master as to setting them off, and his ruling should not be interfered with.

As to the costs of the order of revivor obtained by the plaintiff, that was a necessary step, though after judgment, in order to the taxation, and they should be taxed to him and added to his other costs and set off against the defendant's costs of action.

Costs of appeal to the respondent.

FERGUSON, J.—I am of the opinion that the judgment of the Chief Justice which is appealed from is quite right. I also think that the additional matters mentioned in the judgment of the Chancellor are correctly and properly disposed of by him.

I, therefore, concur in the judgment of the Chancellor.

ROBERTSON, J.—I also concur.

* 391. In a redemption action, in default of payment being made according to the report, the defendant shall be entitled . . . to a final order of foreclosure against the plaintiff; or to an order dismissing the action with costs

† 1165. A set-off of damages or costs between parties shall not be allowed to the prejudice of the solicitor's lien for costs in the particular action in which the set-off is sought; but interlocutory costs in the same action awarded to the adverse party may be deducted.

‡ 1164. Where a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is liable to pay, and may adjust the same by way of deduction or set-off

WILSON v. FLEMING.

Evidence—Cross-examination on Affidavit—Proper Questions—Attachment of Debts—Salary of Municipal Officer—Advances—By-law—Production.

An order having been made attaching all debts due to a judgment debtor by a city corporation, a person describing himself as "paying teller" of the corporation made an affidavit in answer to the judgment creditor's application for a garnishing order absolute, stating that nothing was due from the corporation to the debtor at the time of service of the attaching order. Cross-examined upon his affidavit, the affiant said that the debtor was assessment commissioner for the corporation and in receipt of a salary, but that advances had been made to him on account of it, by the authority of the treasurer of the city, so that nothing was due. The affiant declined to answer certain questions put to him on cross-examination:—

Held, that the affiant should be compelled to answer all questions put to him bearing on the advances made in the past to the debtor, and those bearing on the affiant's authority to make them, and his motives in doing so if he were exercising a discretion.

Held, also, STREET, J., dissenting, that the affiant should answer the question whether he had ever made advances on account of salary to any other employee of the city, and, if he should answer it in the affirmative, he might be further interrogated as to the number of such instances, but he was not to be compelled to disclose the names of persons to whom such advances had been made.

Held, also, that the affiant was not compellable to produce any of the city by-laws, not being the custodian thereof.

[September 8, 1900.—*Divisional Court.*]

THE plaintiff, having recovered judgment against the defendant for a sum of money, obtained an order attaching all debts due to the defendant by the corporation of the city of Toronto, and served it upon the corporation on the 30th April, 1900.

On the 2nd May, 1900, in answer to the judgment creditor's motion for a garnishing order absolute, an affidavit was made by George Kimber, who said that he was paying teller of the corporation of the city of Toronto, and that on the 30th April, 1900, no moneys were owed by the garnishees to the judgment debtor, and the garnishees were not at the time of making the affidavit indebted to the judgment debtor in any sum of money whatever, and that no moneys had since been paid to the judgment debtor.

Kimber, being cross-examined upon his affidavit by the judgment creditor, said that the judgment debtor was assessment commissioner for the city of Toronto; that his salary was \$333.33 a month, payable monthly; that nothing was due him on 30th April, because advances had been made to him on account of his salary, on the authority of the treasurer of the city.

The witness, on the advice of counsel, refused to answer the following questions :—

35. How long have you been advancing sums of money in this way ?

76. Did any other person than Mr. Coady (the treasurer) authorize you to make advances to Mr. Fleming on account of salary ?

77. He is the only one that gave you authority ?

78. What other person could give you authority ?

82. Did you ever pay him at the end of the month ?

84. Did you ever make advances on account of salary to any other employee of the city ?

85. Why did you advance this money to Mr. Fleming ?

105. Have you the by-law appointing Mr. Fleming assessment commissioner ?

Mr. Drayton (counsel for the garnishees)—No, I have not produced that, and I don't produce it; I decline to produce it.

Mr. McKeown (counsel for the judgment creditor)—Will you produce any by-law relating to the appointment of Mr. Fleming as assessment commissioner ?

Mr. Drayton—No.

Mr. McKeown—Or relating to the payment of salary ?

Mr. Drayton—No.

152. Q.—Is there any provision contained in any by-law or any other regulation of the city directing the city treasurer not to pay out any sum exceeding \$50, except by cheque ?

Mr. Drayton—I object.

A.—I can't answer.

153. Q.—Do you mean to say you don't know of such a regulation? A.—Yes.

154. Q.—I am informed, Mr. Kimber, that there is some regulation made by the city to the effect that no moneys are to be paid out by the city treasurer exceeding \$50, except by cheque?

Mr. Drayton—I object to the question being answered.

A.—I refuse to answer, on the advice of my counsel.

Upon the application of the judgment creditor for an order to commit Kimber for refusing to answer, or for such other order as should seem just, an order was made on the 1st June, 1900, by ROBERTSON, J., in Chambers, directing that Kimber should attend at his own expense and answer the questions which he had refused to answer and questions of a similar import and nature.

From this order the judgment debtor and Kimber appealed, and their appeal was heard by a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE and STREET, JJ., on the 8th June, 1900.

Lindsey, Q.C., for the appellants.

S. W. McKeown, for the judgment creditor.

H. L. Drayton, for the garnishees.

Judgment was delivered on the 8th September, 1900.

STREET, J.—In my opinion, Mr. Kimber on his cross-examination should have answered all the questions put to him bearing on the advances made in the past to the judgment debtor and those bearing on his authority to make them, and his motives in doing so if he were exercising a discretion in the matter. In other words, that he should have answered questions 35, 76, 77, 78, 82, and 85.

I do not think he should be ordered to answer question 84, because, if ordered to answer it, there would be no point at which the examination could then logically be

stopped until the whole account of every city official had been investigated, together with the reason for making every payment. If this were an investigation into the affairs of the city treasurer's office, such inquiry would be perfectly proper, but being only an inquiry as to whether anything was due from the city to the judgment debtor on a particular day, it must be confined within reasonable limits.

Mr. Kimber was not in any way liable to produce any of the city's by-laws; he is not the custodian of these city records; and the plaintiff might easily have procured a copy, had he needed it, by making application to the proper official. Question 105 was, therefore, improperly pressed; but I cannot fail to remark that the refusal to produce the by-law was unnecessarily peremptory. Questions Nos. 152 and 153, as to the existence of a certain regulation, were in the first place properly and easily answered by Mr. Kimber, who said that he knew of no such regulation; and then, with no apparent reason, he was advised by his counsel not to answer, and he then refused to answer the very questions which he had already completely answered!

I think that Mr. Kimber should be ordered to attend at his own expense and submit to answer questions 35, 76, 77, 78, 82, and 85, together with such further relevant questions as may reasonably arise from his answers to them; the liability of this public officer to give full information upon any proper question being undoubted.

I think Mr. Kimber must pay the costs of the appeal.

FALCONBRIDGE, J.—I agree in the main with the judgment of my brother Street, with this addition, that Mr. Kimber ought to be ordered to answer question 84, because it is material to know whether the practice in question is a regular and common practice of the city treasurer's department. If he should answer question 84

in the affirmative, he may be further interrogated as to the number of such instances, but he is not to be compelled to disclose the name or names of the city's servants or officers to whom such advances may have been made.

ARMOUR, C.J., agreed with FALCONBRIDGE, J.

BEAM V. BEATTY.

Arrest—Application for Discharge—Onus—Intent to Defraud—Former Absconding.

Upon an application by the defendant for his discharge from arrest under a *ca. re.*, he did not dispute the existence of the debt alleged by the plaintiff, nor that he was about to leave the country without paying or providing for it, but contended that he was not about to quit the Province with intent to defraud.

The debt sued for was contracted in 1893, and arose out of an irrigation scheme, in which the plaintiff was induced by the defendant to purchase an interest. It was alleged, but disputed, that this was a fraudulent scheme. It was also alleged and denied that the defendant in 1893 absconded from this Province to the United States of America. The defendant was a citizen of the United States, and was in Ontario in 1893, and again in 1900, when arrested, for temporary business purposes. It was not shewn that he ever had any property in this Province, nor that he took any away with him in 1893, nor that at the time of his arrest he had any in his hands or under his control. The evidence did not shew that he was at the time of the arrest about to leave the Province hurriedly, but that he intended to stay till he had finished the business which brought him to the Province, and then to return to his own country as of course:—

Held, FERGUSON, J., dissenting, that the Court could not, upon this application, try the question whether the defendant did or did not abscond in 1893; that the onus was upon the plaintiff to make out the fraudulent intent in the departure now proposed, by more than mere suspicion; and that, upon all the facts and merits disclosed, the arrest could not be maintained.

Kersterman v. McLellan (1883), 10 P.R. 122, distinguished.

[June 19, 1900.—*Divisional Court.*]

AN appeal by the defendant from an order of STREET, J., in Chambers, dismissing an application by the defend-

ant for an order for his discharge from custody under an order in the nature of a *ca. re.*, and for the cancellation of the bond given upon his arrest. The facts are stated in the judgment.

The appeal was heard by a Divisional Court composed of BOYD, C., FERGUSON and ROBERTSON, JJ., on the 7th May, 1900.

Masten, for the defendant, contended that the affidavit on which the order for the arrest was granted was insufficient, as it was based upon information and belief, and did not disclose the grounds of belief as required by Rule 518, and that subsequent affidavits filed by the plaintiff were too late. He also contended that the defendant was not, when arrested, about to quit Ontario with intent to defraud, and cited *Phair v. Phair* (1900), 19 P.R. 67; *Clements v. Kirby* (1877), 7 P.R. 103; *Erickson v. Brand* (1888), 14 A.R. 614, 653; *Nelson v. Lippe* (1898), Q.O.R. 14 S.C. 437; *Rice v. Fletcher* (1889), 13 P.R. 46.

A. C. McMaster, for the plaintiff, cited *Kersterman v. McLellan* (1883), 10 P.R. 122; *Eljie v. Butt* (1899), 26 A.R. 13; *McVeain v. Ridler* (1897), 17 P.R. 353; *Scott v. Mitchell* (1881), 8 P.R. 518; *Coffey v. Scane* (1895), 22 A.R. 269; *Vansickler v. Boyd* (1892), 14 P.R. 469; *Meyer Rubber Co. v. Rich* (1891), 14 P.R. 243.

Judgment was delivered on the 19th June, 1900.

BOYD, C.—On the technical view in this case, the original affidavit was insufficient under Rule 518, and the subsequent affidavits objected to in the appeal were filed too late, and should have been rejected. But, waiving technicalities, I would not uphold the arrest.

The proceedings in this case have not been very strictly conducted as to the frame of the affidavits, or as to the time when they were filed. Indulgence has been granted

to the plaintiff, perhaps beyond what is permissible when the liberty of the defendant's person is involved. But, letting things be as they are, and waiving the insufficiency of the original affidavit for arrest in not setting forth sufficient grounds for believing that the defendant was about to quit Ontario with intent, etc., I do not think, upon all the facts and merits disclosed, that the arrest should be maintained.

The defendant is not a native of this country, and was never resident therein except for merely temporary purposes. He is not shewn to have had any property in the country, nor to have taken any with him when he left in 1893, nor to have any now in his hands or under his control. Granted that the Colorado scheme was a fraud—which, however, is a matter in dispute—and granted that there is a legal obligation to pay the amount of the bond, more is wanted to justify the arrest.

As to the intention to leave at the date of the arrest, I think the evidence is altogether lacking. The defendant was here for a special purpose, and was going to stay till that was brought about, and would then return to his own country as of course, and not with intention to defraud anybody.

Can the situation be strengthened by falling back on the alleged fraudulent absconding from the Province in 1893? No facts to ground this belief are at all set forth in the affidavit on which the arrest was made, and it is only by degrees that the plaintiff shews why he so stated under oath. First, because an appointment was not kept on a day fixed, and the elevator boy said the people had "skipped." And, second, because the defendant and his father had gone off, it is said, without paying their hotel bill, and their baggage was retained on that account. The defendant denies leaving in the manner alleged, and explains that in 1894, having completed the business then on hand, he was recalled by his employers in the ordinary course of business.

It is too much to expect that, after a lapse of six or seven years, the Court is to investigate the minutiae of disputed issues as to whether at that date the defendant did or did not abscond. The fact of the prior fraudulent removal one year before was clearly established by overt act in *Kersterman v. McLellan* (1883), 10 P.R. 122. But that is no guide for us in this case. This more resembles *Clements v. Kirby* (1877), 7 P.R. 103, approved of in *Erickson v. Brand* (1888), A.R. at p. 653.

In this condition of affairs, I think we are not in a position to try in any satisfactory way whether the defendant did or did not abscond, as alleged, some years ago, and that then the main, if not the sole, matter for determination is whether this last contemplated return of the defendant to his own country was with intent to defraud. Of that I am unable to satisfy myself upon the present materials. The onus rests on the plaintiff to make out the fraudulent intent by more than mere suspicion, and all the circumstances, to my mind, are against the retention of this defendant in custody.

Order to discharge granted ; costs in cause to defendant. No action to be brought in respect of the arrest.

ROBERTSON, J.—I have considered this case very fully. It is an appeal from the judgment of my learned brother Mr. Justice Street, before whom a motion was made for an order to discharge the defendant from custody, and to cancel the bond given by him in the action, and for releasing the surety therein named. The papers do not disclose by whom the order for arrest was made ; but the plaintiff's affidavit on which such order was made is before me. I think it is well settled law now as to what is necessary before such an order should be made. R.S.O. 1897 ch. 80, sec. 1, is express on this—there must not only be a cause of action in the plaintiff for at least \$100, but that fact must be shewn to the satisfaction of a Judge, and

it must also be shewn by affidavit that such facts and circumstances exist as satisfy the Judge that there is good and probable cause for believing that such person, unless he be forthwith apprehended, is about to quit Ontario with intent to defraud his creditors generally or the plaintiff in particular. Upon that being done, the Judge may order the arrest, etc. It is not enough that a man owes a debt or is liable in an action for damages, nor is it sufficient, supposing that he is so liable, that he is immediately about to quit Ontario; it must also appear that he is about doing so "with intent to defraud his creditors." Imprisonment for debt was long ago abolished; a debtor can only be held to bail now for defrauding his creditor or creditors by quitting Ontario with that intent; and it appears from the result of these proceedings, he has so far satisfied at least two learned Judges of that important fact. I regret, however, with the greatest respect, that I cannot see "eye to eye" with my learned brothers. I think the case of *Phair v. Phair* (1900), 19 P.R. 67, is binding on this Court.

I do not think the defendant ever was a resident of this Province in the sense required to make his leaving it, under any circumstances, an absconder with intent to defraud creditors. Ontario was not his home—he was here temporarily on both occasions, the first time in 1893 as a promoter of an American company, and again during the time of the arrest for a similar purpose. The debt was contracted in 1893, and, it may be, under circumstances which were fraudulent, but that, even if it was established, would not warrant his arrest in an action to recover the debt. Again, it has been held that, since the change in the law, the creditor has no right to have the person of his debtor resident in Canada as a security for his claim. If the defendant had no assets at the time he was about leaving Ontario, it could not be said he was so leaving with intent to defraud. It does not appear here

that defendant had any assets whatever either when he came to or left Ontario.

I am, therefore, forced to the conclusion that the motion on appeal must succeed; but no action to be brought in respect to the arrest. Costs to be costs in the cause to defendant.

I concur fully in the conclusions come to by the learned Chancellor.

FERGUSON, J.—Appeal from the decision of Mr. Justice Street refusing an order for the discharge of the defendant, who had been arrested on a *capias ad respondendum*.

As stated in the judgment in *Clements v. Kirby* (1877), 7 P.R. at p. 106, the learned Judge adopting the language employed by Mr. Justice Gwynne in *Damer v. Busby* (1871), 5 P.R. 356, the application authorized to be made after the arrest is plainly an application founded on new matter for the purpose of shewing that the matters laid before the Judge upon the application for the order for the arrest are capable of other explanation, or can be shewn to have been intentionally or through mistake misrepresented to the Judge. The burden in such a case seems to me to be upon the applicant of shewing that, upon the facts as they actually existed, the arrest should not have been ordered or made.

The facts of the existence of the debt alleged and that the defendant was about to leave the country without paying or providing for the payment of it, are shewn by the evidence, and, for the purpose of this motion, are not now disputed, although it is said that the defendant intends to dispute the existence of the debt at the trial of the action.

The remaining question—a most important one—is: Was the defendant, unless forthwith apprehended, about to quit the Province with intent to defraud his creditors generally or the plaintiff in particular?

The plaintiff shews how the debt arose. He says in his affidavit sworn on the 26th March last, that he was induced by false and fraudulent representations of the defendant to purchase a certain number of shares in a capital stock of a company called the Colorado River Irrigation Company, and that at the time of such purchase the defendant gave him his, the defendant's, bond conditioned for, amongst other things, the return of the money paid by him to the defendant in certain specified events, and that the facts arising were such that the defendant should have returned and repaid the money, but did not. This transaction was as long ago as the year 1893. The plaintiff says in the same affidavit that he made several demands upon the defendant, both by letter and in person, for a return of the money in accordance with the agreements, covenants, and stipulations contained in the bond, but that the defendant always put him off one way or another, and never paid anything on account thereof, and finally absconded from the city of Toronto, and that he, the plaintiff, never thereafter heard of him till recently, when he again applied to him, the defendant, for a performance of the condition and stipulation in the bond. He says the defendant did not do so, although he promised to do so, and made all kinds of excuses.

It appears from the same affidavit that at the time of the transaction between the plaintiff and defendant, he, the defendant, resided and made his home at the town of Thorold, in the county of Welland, and that he subsequently removed to Toronto, and in the spring of 1893 opened up an office there in connection with the said irrigation company, and resided in Toronto till the autumn of 1893, when he went to the United States with intent to defraud, etc.

The defendant lately came back to this Province, and was engaged at the town of Niagara Falls in doing and transacting business for another company. The plaintiff

in the same affidavit says that he had probable cause for believing, and did verily believe, that the defendant, unless forthwith apprehended, was about to quit Ontario with intent to defraud his creditors generally, or him, the plaintiff, in particular, of the money so presently owing to him.

In another affidavit, sworn on the 16th day of April last, the plaintiff tells of having in the fall of 1893 made an appointment with the defendant pursuant to which they were to meet in Toronto at the office of the defendant for the purpose of the defendant paying the money, or part of it, but upon his coming to Toronto at the appointed time and visiting the place where the defendant's office had been, he found that the defendant had flown—absconded.

The defendant's case, as he seeks to shew it, is that he was and is a citizen of and domiciled in the United States; that he was never permanently resident in Ontario; that he never brought any money to Ontario, and never took any away; and that he was not liable to be arrested upon mesne process.

In *Kersterman v. McLellan* (1883), 10 P.R. at p. 125, it is said that it is of no moment where the domicile of a person may be, or to what country he is bound by allegiance as a subject or citizen, if he come and reside here and contract debts here, and is about to quit the country (that is, in fact, to change his residence or place of abode to a foreign country, even though that country be his place of domicile) with intent to defraud his creditors, he is subject to the law of arrest, etc.

From the affidavit of Mr. Whitman, sworn on the 25th day of April last, and other evidence adduced, there are strong grounds for the belief that the company for which the defendant was professedly operating, at the time of the sale of the stock to the plaintiff in this country, was not an honest or honestly organized company, and that the defendant was acting corruptly and dishonestly in making

sales of such stock, and that a very large sum of money received in Ontario upon sales of the stock was either sent or brought out of this country by the defendant at the time of his former departure. On the defendant's own shewing he had an interest (by way of commission) in this fund which he might have deducted and taken therefrom, but did not. There are in evidence here affidavits of defendant's victims in the sale of this stock, other than the plaintiff.

On the evidence I do not arrive at the conclusion that at and immediately before the time of his arrest the defendant was in such or a like position as to residence as was the defendant in the case *Clements v. Kirby*, 7 P.R. 103, who came from Chicago to Brantford, in this country, solely for the purpose of attending the funeral of his father, or in the position of a person who comes to this country upon an errand, or is passing through the country. He was in this country, living here, and doing and transacting important business here, not, as I think, at all in the position of a mere traveller or visitor found in this country.

Then I think that the former conduct of the defendant in respect to the same debt constitutes facts or circumstances that may well be taken into consideration on the question of intent to defraud, and, taking the former conduct of the defendant into the consideration, one has, I think, not far to travel to reach the conclusion that, on all the facts appearing, the defendant was about to leave this country with intent never to pay this debt, or presumably any of the debts that he owed in this country, which is the same as an intent to defraud; and, on the whole case and all the evidence brought forward, I am of the opinion that there should not be an order for the discharge of the defendant, and that the appeal should be dismissed with costs.

RE VANLUVEN AND WALKER.

Costs—Taxation—Mortgagor and Mortgagee—Appeal.

No appeal lies from the taxation of a mortgagee's costs of proceedings under the power of sale in a mortgage, had under R.S.O. 1897 ch. 121, sec. 30.

[September 11, 1900.—*Rose, J.*]

Vanluven, the mortgagee, having sold the mortgaged premises under the power of sale contained in the mortgage deed, Walker, the mortgagor, proceeding under R.S.O. 1897 ch. 121, sec. 30, went before the local Master at Napanee and taxed the mortgagee's costs of the sale.

Walker gave notice of appeal from the taxation returnable before a Judge of the High Court in Chambers, and brought on his appeal for hearing before ROSE, J., on the 10th September, 1900.

J. H. Moss, for the mortgagee, objected that no appeal lay.

A. R. Clute, for the mortgagor.

Judgment was delivered on the following day.

ROSE, J.—The costs were taxed under the provisions of sec. 30 of R.S.O. 1897 ch. 121. The section is as follows: "The mortgagee's costs may without an order be taxed by one of the taxing officers of the Supreme Court of Judicature or by the local Master at the instance of any party interested."

Mr. Moss objected that no appeal lay, the officer named being *persona designata*. I think this objection is entitled to prevail.

The right of appeal is one which must be expressly given. The proceedings are not under or by virtue of the Judicature Act, nor are they in an action, as in the cases to which I was referred of *McCulloch v. Township of*

Caledonia (1898), 19 P.R. 115; *Moke v. Township of Osna-bruck* (1900), *ib.* 117 : see, also, *Crooks v. Township of Ellice* (1894), 16 P.R. 553 ; also, provisions as to appeal from Judges' orders in matters not in Court, R.S.O. 1897 ch. 76, sec. 6, amended by 63 Vict. ch. 17, sec. 14 (O.)

The appeal must be dismissed with costs.

RE HYNES—HODGINS v. ANDREWS.

Partition—Summary Proceeding—Parties—Absentee—Guardian—Dispensing with Service—Substituted Service.

Where, in a proceeding for partition or sale of lands, begun by summary application, a person interested in the estate, not originally made a party, had been long unheard of, and there was uncertainty whether he were living or dead, an order was made by a Judge, under secs. 16 to 20 of the Partition Act, R.S.O. ch. 123, which are expressly made applicable by sec. 33 of the Judicature Act, R.S.O. ch. 51, appointing a guardian and directing that he be served with an office copy of the judgment or order for partition, and notice, for the absentee.

Semble, that the Master to whom a reference is directed by the judgment or order has power to dispense with service of his warrant or of an office copy of the judgment: Rules 203, 659.

Smith v. Houston (1892), 15 P.R. 18, discussed.

Semble, also, that the Court or Judge has power to make an order for substituted service of an office copy of a judgment or order.

[August 29, 1900.—*Meredith, J.*]

AN application by the plaintiff for an order dispensing with the service of an office copy of an order of reference, in a partition matter, upon an absent person, not a party to the proceedings.

The application was heard by MEREDITH, J. at the London Weekly Sittings on the 28th April, 1900.

Coleridge, for the plaintiff.

Essery, for the other parties.

Judgment was delivered on the 29th August, 1900.

MEREDITH, J.—The local Master at London seems to have been under the impression that the case of *Smith v*

Houston (1892), 15 P.R. 18, prevented him from dispensing with service of any of the proceedings in his office.

That impression was plainly erroneous.

The question in that case was whether a Judge in Chambers could, and ought to, dispense with service of a Master's warrant. If the result of the opinion of Boyd, C., expressed in it, were, that the Master had no power of dispensing with service of his own warrant, then it would be in direct conflict with the other opinion expressed in the same case, and so would not be binding upon anyone. In such a case the Master's duty would be to exercise his own judgment upon the question.

It is to be regretted that the Chancellor's views of the question were not more fully reported, if more fully expressed. Nothing whatever is said on the subject of the Master's power to do that which the Chancellor was asked to do.

If the Master had the power, under the Consolidated Rules, then a Judge in Chambers could not assume it by analogy, for it is only where the matter "is not provided for" in the Rules that the practice is, as far as may be, "to be regulated by analogy thereto:" Rule 30.

Consolidated Rule 54, then in force, expressly recognized the Master's power to dispense with service of the warrant to consider, and, I think, plainly conferred upon him that power, which he always had and exercised in Chancery; and under Con. Rule 77, then in force, the warrant to settle the report was to be served on the parties as the Master might direct.

The proceedings in the Master's office were intended to be, and are, plain and simple. When a judgment or order of reference is brought in, a warrant to consider is taken, underwritten also, usually, "to hear and determine the matters referred;" service of this warrant the Master had, as I have stated, power to dispense with. Thereafter no warrant, except perhaps the warrant to settle the report,

ought, ordinarily, to be required, for the reference is kept alive, under the first warrant, by verbal direction of the Master, given upon attendance, from time to time, under it. Consolidated Rules 73, 74, 75, and 76, then in force, shew the great care with which it was sought to simplify, and to keep down the costs of, proceedings in the Master's office.

Consolidated Rule 73, expressly, not only authorized, but required, the Master to "devise and adopt the simplest, most speedy, and least expensive method of proceeding with the reference, and every part of it, and, with that view, to *dispense with any proceedings ordinarily taken*, but which he conceives to be unnecessary. . . ." see also Con. Rule 55.

So that, if any case of dispensing with service of a warrant could arise which was not expressly provided for in the Rules, obviously the proper practice would be for the Master to dispense with it, by analogy to the like power which he expressly had. I could, and can, conceive of no excuse for the delay and greatly increased cost of an application to a Judge at Chambers. The Master would make the direction, and note it in his book, while proceeding under the warrant then in force, without any additional cost.

It seems to me the powers of the Master, under the Rules I have referred to, could not have been brought to the notice of the Chancellor; otherwise I cannot perceive how the order could have gone.

The Rules now in force are quite as strong in support of the Master's power: see Rules 658, 687, 683, 685, 686, and 665.

At all events, the impression of the Master that the case referred to precluded him from exercising any power of dispensing with service of any proceedings in his office, is plainly erroneous and ought to be removed.

But the case in hand is really not one of dispensing with service of a Master's warrant, though so presented. It is quite a different case. If a case of dispensing with service of an office copy of an order of reference, in a partition matter, upon a person not a party to the proceedings, as suggested during the argument, it is a case depending upon different Rules.

Rule 956 provides that a summary application, by an adult person, may be made on notice to one or more of the other persons entitled to share in the land.

This Rule is analogous to Rule 203; the same principle is applied to each of them as to proceeding in the first instance in the absence of some of the persons interested in the subject-matter of the litigation; and, if there be no express provision for bringing into the Master's office the other persons entitled to share in the land, the express provisions in that respect in the case provided for in Rule 203 ought to be adopted by analogy.

Under Rule 203 (3) all persons who, but for that Rule, would be necessary parties in the first instance, are to be served with an office copy of the judgment, indorsed as that Rule provides, "unless the Court or Master dispenses with such service."

The Court meant is probably the Court which pronounced the judgment, but whether so or not, there is no excuse for making a special application to the Court, as the Master has equal power, and can make the order in the proceedings in his office without the expense of any such application.

Then Rule 659 provides, that the Master may direct an office copy of a judgment or order to be served upon any person, not already a party, where it appears to him that such person ought to be made a party, and ought to attend, or be enabled to attend, the proceedings before him.

Under Rule 203 the person must be served, unless service is dispensed with: under Rule 659 he may be

served, and added as a party, if it appears to the Master that he ought to be. The Master's power, upon the question involved, is practically the same under each of these Rules; in the one case he may dispense with service, and in the other he need not make any order for service; the result is the same—the person is not made a party.

It is not needful, therefore, to consider whether Rule 659 is expressly in point in a case under Rule 956: if so, the Master need not make any direction as to the absent party; if not, then by analogy Rule 203 applies, and the Master can dispense with service, with the like result.

There seem to be no other Rules helpful in solving the question: Rule 162 (4) provides merely for an order authorizing service of an office copy of a judgment or order out of the jurisdiction. The other Rules as to service are not applicable to the proceedings in question.

There is now no express provision that the Master shall report his reasons for dispensing with service; but, in dealing with the shares and interests of absent parties, it is entirely proper, if not necessary, that he should state that such persons have not been made parties, and have not been served under either of these Rules, and the reason why.

There seems to me, therefore, to be no doubt whatever that, if the question were really one of dispensing with service of a Master's warrant or of an office copy of a judgment, the Master had ample power, and that there was no need for this application, even if there be power here also.

But it may be sometimes necessary or desirable that a person, although he cannot be served in the usual manner, be treated and named as a party to the action or proceedings, and bound in the same manner as if originally made a party.

There seems to be no provision expressly made for such a case, whether the person be within or without the juris-

diction of the Court, nor any general Rule of this Court similar to Order LXVII., Rule 6, of the Supreme Court in England; but, by analogy to our Rules allowing substituted service in certain cases, it appears to me to be competent for a Court or Judge to make an order for substituted service of an office copy of a judgment or order such as that in question, indorsed as the Rules require, whether the proceedings be under Rule 203 or 659—having regard, of course, to the provisions of the Rules respecting service out of the jurisdiction in a case of that kind.

But since the argument I have found that this is really not a case for dispensing with service, nor for substituted service; it is a case expressly and plainly provided for in secs. 16 to 20 of the Partition Act,* provisions expressly made applicable to any action or proceeding in this Court, by sec. 33 of the Judicature Act.†

The proper order to be made, in the circumstances of this case, therefore, is, that the official guardian be appointed guardian as the Act provides, and that he be served with the office copy of the judgment and notice for the party so long unheard of, and as to whom there is uncertainty whether he be living or dead.

An order may go accordingly; but it must provide for payment into Court of the share of such party.

* R.S.O. 1897 ch. 123, sec. 16.—If any party interested in the estate respecting which proceedings are, or are proposed to be, taken under this Act, has not been heard of for three years or upwards, and it is a matter of uncertainty whether such party is living or dead, it shall be competent for a Judge to appoint a suitable and disinterested person to be a guardian, for the special purpose of taking charge of the interest of the said party and of those who, in the event of his being dead, are entitled to his share or interest in the estate.

Sections 17 to 20 provide regulations as to the application for such appointment, the security to be given, the disposition of the estate or interest, etc.

† R.S.O. 1897 ch. 51, sec. 33.—In any action or proceeding in the High Court for partition or sale . . . where any of the persons interested . . . are unknown to the plaintiff, or have not been heard of for three years or upwards, the Court shall have the same jurisdiction that, in proceedings under the Partition Act, it possesses for the purpose of binding the interests of such persons and dealing with the estate. . .

DICKERSON ET AL. V. RADCLIFFE ET AL.

Costs—Interlocutory Order—“Costs in the Cause”—Discretion of Trial Judge.

Where an interlocutory order in an action directs that the costs of certain proceedings shall be “costs in the cause,” that is not a final disposition of such costs in favour of the party who shall succeed in the action, but merely puts these costs in the same position as any other of the ordinary costs of the action, that is, leaves them to be dealt with in the discretion of the trial Judge under Rule 1130 and sec. 119 of the Judicature Act, R.S.O. 1897 ch. 51.

Koosen v. Rose, [1897] W.N. 25, 76 L.T.N.S. 145, 45 W.R. 337, 13 Times L.R. 257, distinguished.

AN appeal by the plaintiffs from a taxation of the defendants’ costs by the senior taxing officer at Toronto, who allowed to the defendants the costs of five interlocutory applications, the orders made therein providing that the costs thereof should be “costs in the cause.”

The judgment of the Judge at the trial (which was not appealed against) adjudged that the action “be and the same is hereby dismissed without costs except as hereinafter mentioned,” and “that the plaintiffs do pay to the defendants forthwith after taxation the costs of any interlocutory motions in which the defendants succeeded and which the trial Judge had power to dispose of.”

In four out of the five applications in question the defendants succeeded, but in the fifth they did not succeed.

THE appeal was heard by MEREDITH, J., in Chambers, on the 14th May, 1900.

J. W. Bain, for the plaintiffs.

J. B. Holden, for the defendants.

Judgment was delivered on the 30th August, 1900.

MEREDITH, J.—The trial Judge intended to give to the defendants so much of their costs in the action as were incurred in interlocutory proceedings in which the defendants

were successful, and to guard against any conflict with any previous order respecting any of such costs; and that is the fair meaning of the words of the formal judgment awarding the defendants such costs.

There were, therefore, two questions for the taxing officer's consideration before taxing the bills of costs in question, namely:—

(1) Did the defendants succeed? And

(2) Did the order dispose of the costs of the proceedings so as to exclude the trial Judge's general discretionary power over the costs of the action under Rule 1130* and sec. 119 of the Judicature Act?†

It may be taken for granted that, if the orders disposed of the costs one way or the other, there was no intention, and no power, to alter such disposition of them. That is to say, the trial Judge could not deal with them as if hearing an appeal against the order. He could not, for instance, award costs to either party if the order provided that neither party should have the costs of it.

In all of the proceedings in question the only order made as to costs was, substantially, that they should be "costs in the cause."

And so the whole thing seems to hinge upon this, whether such an order gives the costs to either party, or leaves them to be dealt with in the discretion of the trial Judge the same as the other costs of the action.

It never would have occurred to me that, in such a case as this, making the costs of a motion costs in the cause or action was any final disposition of them, or anything more than putting them in the same position as any

*1130.—(1) Subject to the provisions of the Judicature Act, 1895, and to the express provisions of any statute heretofore or hereafter passed, the costs of and incidental to all proceedings in the Supreme Court shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent the costs shall be paid.

†Section 119 of R.S.O. 1897 ch. 51 is to the same effect as Rule 1130.

other of the ordinary costs of the action, as, for instance, the costs of the pleadings, and so, of course, subject to the trial Judge's power over costs, under the statute and Rule; and I have always acted under the supposition that such was the effect of such an order.

Of course, in the days and in the Courts when and where the trial Judge had no discretionary power over the costs, but they went by law to the successful party, an order making costs costs in the cause or action had the effect of giving them to the successful party, but he got them, not under the order, but under the judgment awarding him the costs of the action. Without that judgment I do not see how we could ever have taxed them.

There were two things urged against this view of the matter. The first was, that, if the words "costs in the cause" meant no more than that which I have indicated, it was useless to insert them in the order, because the costs of all such interlocutory proceedings are, according to the practice, costs in the cause. That may have been so at common law: *Pugh v. Kerr* (1840), 6 M & W. 17: but it was not so in Chancery; there a party failing in his motion, and a party failing in opposing a motion, would not get them; and the latter practice prevails here. But, even if this were not so, would it not be nearer the mark to attribute the use of the words to needless caution or forgetfulness of the practice affecting the question?

There seems to me to be no real force in either of these points.

But it is said that the case of *Koosen v. Rose*, [1897] W. N. 25 (9), 76 L. T. N. S. 145, 45 W. R. 337, 13 Times L.R. 257, is an authority for the contention that the order making the costs costs in the action is an order awarding them to the party who shall succeed in the action, but postponing the taxation until after the judgment.

That case is certainly no authority for that, though an expression of one of the Judges is to that effect; nor,

in my judgment, does it at all conflict with the views I have expressed, but they are quite in accord with the ruling in it.

That was a case of this character: under a Rule of Court expressly requiring the Judge to deal with the costs of the application there in question, upon the hearing of it, or to refer them to the Judge at the trial, he made them costs in the action. At the trial, the trial Judge thought that that order was wrong in that respect, and virtually set it aside to that extent, and ordered that there should be no costs of that application, though the party who sought to tax them succeeded in the action and was given his costs of it by the trial Judge.

In four out of the five applications in question (1) the defendants succeeded; and (2), as the trial Judge had power in the way I have mentioned over the costs of them, they were rightly taxed and allowed; and the appeal should be dismissed.

In the other of the applications the defendants (1) did not succeed; and (2), as the trial Judge likewise had power over the costs of it, the defendants were not entitled to them; and the appeal to that extent should be allowed.

There will be no order as to the costs of this motion.

STEWART V. JONES.

Receiver — Equitable Execution — Claim against Crown — Distribution of Fund—Creditors' Relief Act—Undertaking.

The plaintiff and defendant were partners, and as such had a claim against the Crown for work done, which resulted in the payment of a large sum. Subsequently the partnership made a further claim for interest on the sum paid, which was rejected, and could not have been enforced by a petition of right. The Crown, however, without admitting any liability, offered a sum in satisfaction of the claim for interest, and an appropriation was made by Parliament to enable that to be done, but the appropriation lapsed. A Minister of the Crown afterwards offered to pay the defendant half the amount of the appropriation, and the defendant agreed to accept it. Accordingly a sum was voted by Parliament for this purpose, and by an order-in-council authority was granted to pay it to the defendant:—

Held, that on the date of the order-in-council there existed a debt due by the Crown to the defendant, arising out of contract, and recoverable by petition of right.

Held, also, that this sum could be made available for satisfaction of a judgment recovered by the plaintiff against the defendant.

Willcock v. Terrell (1878), 3 Ex. D. 323, and *Manning v. Mullins*, [1898] 2 I. R. 34 followed.

The fact that the Crown is the debtor does not stand in the way of the Court going as far as it can go, without directing or assuming to direct what shall be done by the Crown, towards making such an asset of a judgment debtor available to satisfy the claim of his judgment creditor.

Upon the plaintiff undertaking that the fund, if and when it should come to the hands of the receiver, should be applied as if it had come to the hands of the sheriff under the Creditors' Relief Act, an order was made restraining the defendant from receiving the fund, authorizing a receiver to receive it, and providing that his receipt should be a sufficient discharge to the department or officer making payment.

[September 22, 1900.—*Meredith*, C.J.]

AN application by the plaintiff (judgment creditor) to continue a receiver by way of equitable execution and for other relief. The facts appear in the judgment.

The motion was heard by MEREDITH, C.J., in Court, on the 18th September, 1900.

J. H. Moss, for the plaintiff.

Shepley, Q.C., for the defendant.

J. A. Paterson, for the Crown.

Judgment was delivered on the 22nd September, 1900.

MEREDITH, C.J.—The plaintiff has recovered judgment against the defendant for a large sum in respect of the transactions of a partnership formerly existing between them, and the object of the present application is to make available for the satisfaction *pro tanto* of that judgment a sum of \$847.50 which it is alleged is due by the Crown to the judgment debtor in respect of certain works undertaken for the Crown by the partnership.

A claim was made by the partnership upon the Crown, arising out of the contract for these works or in connection with them, which resulted in a payment of \$38,915.37 being made to the partnership by the Crown on the report of a commissioner appointed to examine into the claim.

Subsequently a further claim on the Crown was made by the partnership for interest on this sum. This claim was rejected, and it may be assumed that it could not have been enforced by a petition of right. The Crown, however, without admitting any liability, offered to pay to the partnership \$1,695 in satisfaction of the claim, and an appropriation was made by Parliament to enable that to be done. This appropriation, however, lapsed owing to the refusal of the plaintiff to acquiesce in the receipt of the sum proposed to be paid in full satisfaction of the claim. The Minister of Railways and Canals thereupon came to the conclusion to deal separately with the defendant as to his half of the interest claimed, and to pay the \$847.50 to him on the same terms as it had been proposed to pay the larger sum to the partnership. The defendant appears to have acquiesced in the Minister's proposal and to have agreed to accept the sum offered on the terms on which it was proposed to pay it. Accordingly in the supply bill of last session \$847.50 was granted by Parliament to Her Majesty for the purpose, as appears in the Act, of paying "Ralph Jones" (the defendant) "half interest at 6 per

cent. on \$38,915.37, amount reported by commissioner on Oxford and New Glasgow Railway claim respecting 'hard pan' of Stewart and Jones's contract No. 6, made up as follows: on \$38,055.37 from January 7, 1893, date of finding, to September 20, 1893, date of payment, and on \$860 from January 7, 1893, date of finding, to October 9, 1894, date of payment; in all, \$1,694.99, \$847.50;" and by an order-in-council, approved by His Excellency the Governor-General on the 25th July, 1900, authority was granted for the payment of that sum in accordance with the provisions of the supply bill which I have quoted.

Upon this state of facts it appears to me that on the 25th July, 1900, there existed a debt due by the Crown to the defendant of \$847.50 arising out of contract and recoverable by petition of right.

If both of the parties to the transaction had been subjects, I do not doubt that what was done would have created a contract by the one to pay and the other to receive in satisfaction of the claim of the defendant \$847.50, enforceable by action, and I see no reason why what was done did not amount to a contract by the Crown to pay, and by the defendant to receive, that sum in the same way, enforceable against the Crown by petition of right.

It does not seem to me material that, as I assume the fact to be, there was no valid legal claim for the interest. There appears to have been, in the view of Parliament at all events, a claim on the conscience of the Crown to the extent to which the appropriations were made, and a claim for more was being *bonâ fide* put forward by the contractors as an enforceable claim, and the compromise of that claim formed a good consideration for the promise of the Crown to pay what it offered to pay, and the defendant agreed to accept, in satisfaction of his claim.

Can then the sum of \$847.50 be made available to satisfy *pro tanto* the plaintiff's judgment debt? If the debtor were a subject within the jurisdiction of the Court,

it is clear, if I am right thus far, that it might be reached by garnishing process. A garnishee order cannot, however, be made against the Crown. Is the plaintiff then without remedy? I think not. The fact that the Crown is the debtor does not stand in the way of the Court going as far as it can go, without directing or assuming to direct what shall be done by the Crown, towards making such an asset of a judgment debtor available to satisfy the claim of his judgment creditor.

In *Willcock v. Terrell* (1878), 3 Ex. D. 323, it was held by the Court of Appeal that the pension of a judgment debtor which was payable to him by the Crown was a proper matter for sequestration, and that the Court might restrain the debtor from receiving so much of the pension as had been appropriated by the order of the Court to the liquidation of the judgment debt, and direct the sequestrator to receive from the Treasury or the Paymaster-General the amount in arrear.

Dealing with a similar objection to that which was strenuously urged by Mr. Shepley in the present case, that the Court could not compel the Paymaster-General to pay the sequestrators, Lord Justice Cotton said (p. 334): "It cannot. But the Court can prevent the defendant from receiving, and authorize the sequestrators to receive the sum mentioned. The order is in a form which is usual in cases where a receiver or other officer of the Court is authorized to receive a sum from any one not before the Court."

It was said that this case was inconsistent with the more recent cases and ought not to be followed, but in that I cannot agree. As was pointed out in *Manning v. Mullins*, [1898] 2 I. R. 34, *Willcock v. Terrell* has not in any subsequent case been questioned or criticized, and its authority is unimpeached.

Though I am not free from sharing the difficulty felt and given expression to by Lord Justice Fitzgibbon, that, though the intention of making an order against the Pay-

master's Department was disclaimed, an order was being made which was of no practical use unless and until the department acted upon it, I am bound to follow *Willcock v. Terrell*, and, following it, to make an order similar in terms to the orders made in that and the Irish case to which I have referred.

It was urged by Mr. Shepley that the order ought not to be made because it was manifest that the Dominion authorities would not pay the fund to the receiver, but with that I have, I think, nothing to do. It is my duty to make such order as according to law and the practice of the Court the applicant is entitled to, and the responsibility for its becoming ineffectual, if that result should follow, must rest with those in whose discretion it lies to make or to refuse to make payment to the receiver appointed by the Court.

It was further urged as a reason for not making the order, that the refusal of the Dominion authorities to pay to the receiver would result in the destruction of the fund, as the appropriation would lapse at the end of this month, and that, if it should lapse, payment cannot be made to any one. With this suggested contingency, also, I have nothing to do, but such a result may certainly be avoided if the defendant does what upon the material which is before me it is open to him to do, viz., executes a power of attorney to the receiver authorizing him to receive the fund.

In view of the conflicting decisions* as to the right of a creditor who obtains such an order as I propose to make to have the fund applied in payment of his debt, to the exclusion of the other creditors of the judgment debtor from sharing in the fund, it is, I think, just and proper that as a condition of making the order I should require the applicant to undertake that the fund, if and when it shall

* See *Dawson v. Moffatt* (1886), 11 O.R. 484; *Sylvester v. McEachon* (1889), 9 C.L.T. Occ. N. 138, and cases referred to in note.

come to the hands of the receiver, shall be applied as it would be applied if it had come to the hands of the sheriff under the Creditors' Relief Act.

Upon this undertaking being given, the order will go restraining the defendant until further order from receiving the fund in question, and continuing the sheriff of the county of Carleton as receiver of it, and providing that the receipt of the receiver shall be a sufficient discharge to the department or officer making payment of the fund to him.

The plaintiff's costs of the application will be paid out of the fund if received, and if the fund be not received will be added to the judgment debt.

DUEBER WATCH CASE MANUFACTURING CO. V. TAGGART
ET AL.

Evidence—Leave to Adduce, after Judgment in Appeal—Rule 498—Amendment of Record after Judgment.

After the judgment of the Court of Appeal affirming the judgment of the trial Judge dismissing the action, had been drawn up and entered, and while an appeal was pending therefrom to the Supreme Court of Canada, the plaintiffs moved for leave to adduce further evidence for the purpose of shewing that an exhibit which was used as part of the evidence in the case was not a true copy of the original document. It was not suggested that there was any error in the judgment of the Court of Appeal which could be corrected by the introduction of the proposed evidence, or that, if the proposed evidence had been given while the appeal was pending, the judgment would have been different. It might tend to displace one of the grounds on which the trial Judge relied, or might prevent the defendants from relying upon that ground if the case went further, but that was all that could be said:—

Held, that the application must be refused.

Rule 498, which empowers the Court to receive further evidence, is clearly confined to cases where such evidence is sought to be introduced for the purpose of the appeal.

[December 20, 1899.—*The Court of Appeal.*]

JUDGMENT was given by the Court of Appeal on the 9th May, 1899, dismissing the appeal of the plaintiffs from the judgment of the trial Judge, whereby the action was dismissed: see 26 A.R. 295.

The plaintiffs were prosecuting a further appeal to the Supreme Court of Canada, when, as they alleged, they discovered that there was a mistake in an extract from one of the books of account kept by the plaintiffs, which extract was by arrangement filed as an exhibit and made evidence in the action, and was before the Court as such. The mistake was, as alleged, in the heading of an account, which appeared in the plaintiffs' general ledger as "F. S. Taggart & Co.," but in the extract in question appeared as "F. S. Taggart."

The Supreme Court ordered that the case should be removed from the list of appeals inscribed in order that the application now in question might be made.

On the 9th November, 1899, the plaintiffs moved accordingly before a Judge of the Court of Appeal in Chambers, upon affidavits shewing the mistake, for an order allowing them to amend the exhibit, and for leave to adduce further evidence to establish the mistake.

The motion was referred to the full Court, and was heard before BURTON, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 15th November, 1899.

Charles Millar, for the plaintiffs.

J. A. Mills, for the defendants.

Judgment was delivered on the 20th December, 1899.

OSLER, J.A.—In this case we gave judgment some time ago dismissing the appeal from the judgment at the trial, and our judgment has been formally drawn up and entered. The case is, therefore, no longer depending in this Court. Mr. Millar, for the plaintiffs, now moves for leave to adduce further evidence for the purpose of shewing that an exhibit which was annexed to or which accompanied the evidence taken upon a foreign commission is not a true copy of the original document, viz., a page of one of the plaintiffs' own books of account, which had been produced before the commissioner when the evidence was taken. The copy was made and then handed to the commissioner for the purpose of the commission by the plaintiffs' own clerk or book-keeper. It is not suggested that there is any error in the judgment of this Court which could be corrected by the introduction of the proposed evidence, or that, if the supposed mistake in the copy had been discovered and the new evidence given while the appeal was pending, the judgment of the Court would have been other than it is. It might tend to displace one of the grounds on which the learned trial Judge relied, or might prevent the defendants from relying upon that ground if the case goes further, but that is all that can be said about it.

Mr. Millar relied upon the case of *West v. Haggerston* (1815), G. Cooper 134, where, after the enrolment of the decree, the Chancellor allowed errors in addition appearing upon the face of the schedules referred to in the Master's report to be corrected on motion, involving, of course, a correction of the decree on further directions.

In *Re Swire, Mellor v. Swire* (1885), 30 Ch. D. 239, approved in *Milson v. Carter*, [1893] A.C. 638, the Court of Appeal held that it clearly had jurisdiction to alter the record of its order—which had been drawn up, passed, and entered in such a form that it might be contended to decide questions which had not been before the Court and which it had not intended to decide,—so as to make it conformable to the order which the Court had pronounced.

Baker v. Purvis (1887), 67 L.T.N.S. 131, again, is a decision of the Court of Appeal that the Court below had jurisdiction to correct an error in a judgment arising from an accidental slip, although the time for appealing from the judgment had expired. There a sum had been erroneously credited to the defendant by way of set-off upon a statement erroneously, but in good faith, made by the defendant at the trial and accepted by the plaintiff, that certain payments of interest had been made by him which had not been credited.

Hatton v. Harris, [1892] A.C. 547, is another important decision as to the power of the Court under the modern practice to correct an accidental slip or omission in a very ancient judgment.

None of these cases, however, is at all like the present one, nor do they suggest any principle on which the Court could grant the plaintiffs' application.

Consolidated Rule 498, which empowers the Court to receive further evidence, is clearly confined to the cases where such evidence is sought to be introduced for the purpose of the appeal. It does not warrant this Court in entertaining an application to correct the record of the

case as it was before it, for the purpose of proceedings which may or may not be taken in other Courts. If any Court has authority to do what is asked, it is not this Court.

What, if any, relief the plaintiffs might be entitled to, and in what form of proceedings, had the judgment of this Court turned upon an alleged error of this kind, we need not consider. Reference may be made to *Synod v. DeBlaquière* (1883), 10 P.R. 11; *Bank of British North America v. Western Assurance Co.* (1886), 11 P.R. 434.

The motion must be refused with costs.

BURTON, C.J.O., MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

[The judgment of the Court of Appeal upon the main appeal was affirmed by the Supreme Court of Canada: 30 S.C.R. 373.]

The plaintiffs also appealed to the Supreme Court of Canada from the above decision, but the Court refused to entertain the appeal, it being upon a mere matter of practice, and dismissed it on the 24th April, 1900.]

MURR V. SQUIRE ET AL.

Costs—Interlocutory Order—“Costs in the Cause”—Discretion of Trial Judge.

The judgment of the trial Judge was in favour of the plaintiff, and was not appealed against. As to costs, it adjudged that the defendants should pay to the plaintiff the costs of certain witnesses, and continued: “This Court doth not see fit to interfere with the interlocutory orders disposing of certain costs throughout the action, nor make any further or other order as to costs.”

Two interlocutory orders made the costs of applications “costs in the cause;” two made them “costs in the cause to the successful party;” one order provided that “the defendant do pay to the plaintiff the costs of this motion to be taxed in any event of the cause but on the final taxation of the costs herein.”

It was conceded that the plaintiff was entitled to the costs made payable in any event:—

Held, following *Dickerson v. Radcliffe*, *ante* p. 223, that the costs made costs in the cause were subject to the disposition of the trial Judge, and under the judgment were not to be taxed to the plaintiff:—

Held, also, that the words “costs in the cause to the successful party” did not mean more than costs in the cause; and, even if they did, the plaintiff was not a successful party.

Brotherton v. Metropolitan District Railway Joint Committee, [1894] 1 Q.B. 666, followed.

[September 17, 1900.—*Rose, J.*]

AN appeal by the defendants from the taxation of the plaintiff's costs by a local officer, under the circumstances set forth in the judgment.

The appeal was heard by ROSE, J., in Chambers, on the 14th September, 1900.

J. H. Moss, for the defendants.

R. McKay, for the plaintiff.

Judgment was delivered on the 17th September, 1900.

ROSE, J.—This was an application by the defendants for review of the taxation of the plaintiff's bill of costs. The question raised is whether, the learned trial Judge having refused the plaintiff any costs except as hereinafter stated, the plaintiff, notwithstanding, was entitled to certain interlocutory costs.

Two interlocutory orders made the costs to be costs in

the cause; two made them costs in the cause to the successful party; one order provided that "the defendant do pay to the plaintiff the costs of this motion to be taxed in any event of the cause but on the final taxation of the costs herein."

At the trial before the learned Chancellor, in giving judgment the costs were disposed of as follows: "Although the plaintiff is entitled to succeed, she should not get costs, but the other side should not succeed because of their attitude."

Upon the learned Chancellor's attention being called to the interlocutory orders, he said, "I will leave the interlocutory orders as they are."

The judgment formally drawn up disposed of the costs as follows: "And this Court doth further order and adjudge that the defendants do pay to the plaintiffs the costs of the witnesses who were called to prove that the plaintiff was in need, forthwith after the taxation thereof.

"This Court doth not see fit to interfere with the interlocutory orders disposing of certain costs throughout the action, nor make any further or other order as to costs."

There is no dispute as to the order giving the plaintiff the costs in any event. It is admitted that the plaintiff is entitled to such costs, notwithstanding the disposition of the costs at the trial.

I am of opinion that the disposition of the costs of the remaining orders was practically the same. "Costs in the cause to the successful party" does not, I think, mean more than costs in the cause. Costs in the cause would not go to the unsuccessful party; and in *Brotherton v. Metropolitan District Railway Joint Committee*, [1894] 1 Q.B. 666, Lord Esher held that where the costs of a former trial were to abide the result of a new trial, the result meant the result of the second trial as far as costs were concerned.

The making of the order that the costs should be in the cause brings the case within the decision of my brother

Meredith in *Dickerson v. Radcliffe*, 30th August, 1900,* where he determined that where costs were made in the cause they were subject to the order and disposition of the trial Judge. I think, therefore, that when the learned Chancellor declined to give the plaintiff any costs save the costs of certain witnesses, to which I have not particularly referred and which do not affect the question, he determined that the costs that by these orders had been made costs in the cause should not go to the plaintiff.

I extract from my learned brother Meredith's judgment:—"It would never have occurred to me that in such a case as this, making the costs of the motion costs in the cause or action was any final disposition of them, or anything more than putting them in the same position as any other of the ordinary costs of the action, as, for instance, the costs of the pleadings, and so, of course, subject to the trial Judge's power over costs, under the statute and Rule; and I have always acted under the supposition that such was the effect of such an order."

If "costs in the cause to the successful party" means more than "costs in the cause," then it seems to me that the plaintiff has not been a successful party within the decision of Lord Esher above referred to.

I think the appeal must be allowed with costs.

*Now reported ante, 223.

RE HUBBELL.

Interpleader Issue—Parties—Onus.

Where the proceeds of a life insurance policy were claimed by the widow of the assured and also by an assignee for value, and it appeared that the assured had first made a declaration in writing on the policy devoting all the benefit to his wife, and had subsequently by writing assumed to limit such benefit to \$1, and had then made the assignment to the other claimant :—

Held, that the latter should be plaintiff in an interpleader issue ordered to be tried between the claimants.

[September 19, 1900.—*Rose, J.*]

AN application was made by the Canada Life Assurance Company for leave to pay into Court the sum of \$3,000, moneys arising from an insurance upon the life of Edward Fitzroy Hubbell, deceased, and to be discharged from liability therefor. The moneys were claimed by Annie H. L. Hubbell, the widow of the deceased, and also by one Russell.

The assured, in his lifetime, by writing indorsed on the policy, declared that “the within policy and all advantages to arise therefrom shall accrue for the benefit of my wife.” Some years later he made a further indorsement in writing assuming to limit the interest of his wife to \$1, and then assigned the policy to Russell as security for a loan of \$2,500.

An order was made in long vacation by the Master in Ordinary (holding Chambers in lieu of the Master in Chambers) allowing the company to pay the money into Court and discharging them from liability, and also directing the trial of an issue between the claimants, and providing that the widow should be plaintiff in such issue.

The widow appealed from the part of the order directing that she should be plaintiff in the issue, and her appeal was heard by ROSE, J., in Chambers, on the 17th September, 1900.

H. M. Mowat, Q.C., for the appellant.

A. G. Slaght, for Russell.

W. F. Burton, for the company.

Videan v. Westover (1897), 29 O.R. 1, *Duncan v. Tees* (1885), 11 P.R. 66, *Doran v. Toronto Suspender Co.* (1890), 14 P.R. 103, and an article in 17 C.L.T. 129, were referred to.

Judgment was delivered on the 19th September, 1900.

ROSE, J.—Having regard to the provisions of the Insurance Act, R.S.O. 1897 ch. 203, secs. 159 *et seq.*, the onus is on the claimant Russell to establish his title as against the widow.

It was admitted on the argument that without her consent her husband had no power to give Russell any title as against her, the wife.

The production of the policy shews a declaration in favour of the wife and a subsequent assignment to Russell, but no evidence of any consent by the wife to the assignment. I think, therefore, the contention of the widow that Russell must make out his case as against her, and that she is not called upon to attack his title, but is entitled to rely simply upon her own, is right, and that she should be the defendant.

The appeal will be allowed with costs in the cause to the widow in any event.

TOWNSHIP OF TILBURY WEST v. TOWNSHIP OF ROMNEY.

Stay of Proceedings—Prior Action Pending—Parties.

In this action the plaintiffs sought to recover from the defendants a large sum of money, being the portion assessed upon the defendants of the cost of certain drainage works constructed and paid for by the plaintiffs. In a previous action against the same defendants, the plaintiffs therein, who were land-owners in the defendants' township and assessed for a portion of the sum now sued for, sought a declaration that the defendants' by-laws purporting to impose this assessment upon the plaintiffs therein, and all the proceedings upon which they were founded, were void, and an injunction to restrain any proceedings for the collection of the amount for which the plaintiffs therein were assessed. In that action judgment had been given in the defendants' favour, but the plaintiffs had an appeal to the Supreme Court of Canada pending when the present action was brought:—*Held*, that the present action should not be stayed until after the determination of the appeal in the other.

[September 15, 1900.—*Divisional Court.*]

THIS was an appeal by the plaintiffs from an order of ROSE, J., in Chambers, on the 11th June, 1900, dismissing an appeal by the plaintiffs from an order of the local Judge of the High Court at Chatham, directing that the proceedings in this action be stayed until ten days after the determination of an appeal pending in the Supreme Court of Canada in a certain action wherein the Sutherland-Innes Company, limited, were plaintiffs, and the defendants the corporation of the township of Romney were defendants.

The present action was brought by the corporation of the township of Tilbury West to recover from the corporation of the township of Romney the sum of \$7748.20 and interest from the 17th July, 1897, being the portion assessed upon the defendants of the cost of certain drainage works constructed and paid for by the plaintiffs.

The grounds upon which the order to stay proceedings in this action was made were that the questions likely to arise in it were the same as those arising in another action

in which the Sutherland-Innes Company were plaintiffs, and these defendants were defendants. The Sutherland-Innes Company were the owners of a large tract of land in the township of Romney assessed for a portion of the \$7748.20 now sued for, and their action was brought for a declaration that the by-laws of the council of Romney purporting to impose this assessment upon them, and all the proceedings upon which they were founded, were void, and for an injunction to restrain any further proceedings for the collection of the sum assessed. Judgment had been given in the defendants' favour in the Courts of this Province, and the plaintiffs in that action had appealed to the Supreme Court, where their appeal was still pending. The defendants had, therefore, successfully upheld the validity of the by-laws and assessment so far, but they had refused to pay over to the plaintiffs the sum assessed against them as a township, lest the pending appeal in the Supreme Court should be determined adversely to them. The plaintiffs in the present action, on the other hand, insisted that the sum for which the action was brought had been due them for several years, and that they were not bound to await the result of the appeal in the other action, which, even if adverse to the defendants, would not affect the present action or their right to prosecute it.

The local Judge of the High Court at Chatham, upon the application of the defendants, made an order staying the proceedings in the present action until ten days after the determination of the pending appeal in the Supreme Court in the other action, and ROSE, J., upon appeal to him, affirmed the order.

The plaintiffs then appealed to a Divisional Court, and the appeal was argued on the 10th September, 1900, before FALCONBRIDGE, C.J., and STREET, J.

Du Vernet, for the plaintiffs.

Aylesworth, Q.C., for the defendants.

On the 15th September, 1900, the judgment of the Court was delivered by

STREET, J.—The plaintiffs claim a debt due them by the defendants as they allege, and which if due has been owing them for some years. Their action has been stayed because of the pendency of some litigation between the defendants and certain third parties who deny the existence of any debt from the defendants to the plaintiffs. The defendants say that if that litigation be determined in their favour they will pay the plaintiffs' claim, otherwise they will not; and at their request the present action has been stayed by the order now appealed against until the result of the other litigation be known.

It is plain that the present plaintiffs will not in any way be bound by the result of the other action, to which they are in no way parties, and that, however that action may result, they will still be entitled to prosecute their own action. It is said that, although this is no doubt technically true, yet their rights will for all practical purposes be determined by the result of the other case. That, however, by no means follows, for the present plaintiffs may place both the facts and the law before the Court in a different light from that shed upon it by the Sutherland-Innes Company, the plaintiffs in the other case, and by doing so may succeed even should those plaintiffs fail. The plaintiffs in bringing the present action are pursuing an undoubted right: they are doing nothing of a vexatious character, and in my opinion they should not be hindered in the prosecution of their action: see *Higgins v. Woodhall* (1889), 6 Times L.R. 1; *Sharp v. McHenry* (1886), 55 L.T. N.S. 747; *Fawkes v. Griffin* (1897), 17 P.R. 473; *Great North-West Central R.W. Co. v. Stevens* (1899), 18 P.R. 392.

The appeal should, therefore, be allowed, and the order of the local Judge should be set aside, with costs here and below.

EDSALL V. WRAY.

Venue—Residence of Plaintiff—Statement of Claim—Rule 529 (b).

Rule 529 provides that: (a) the plaintiff shall, in his statement of claim, name the county town at which he proposes that the action shall be tried; (b) where the cause of action arose and the parties reside in the same county, the place so to be named shall be the county town of that county:—

Held, that the residence of the plaintiff at the time of the delivery of the statement of claim, and not at the time of the issue of the writ of summons, is the time referred to in Rule 529 (b).

[September 22, 1900.—*Rose, J.*]

THIS was an action for slander. In the writ of summons no place of trial was named. In the statement of claim the city of London was named as the place of trial.

The defendant moved to change the place of trial to Stratford, upon an affidavit stating that the cause of action (if any) arose in the city of Stratford; that both the plaintiff and defendant resided in the city of Stratford on the day of the issue of the writ of summons, the plaintiff being a bartender in a hotel in Stratford. The plaintiff filed an affidavit in answer, stating that he had been since before the delivery of the statement of claim a resident of London, he having been only temporarily employed in Stratford for a short period, and his wife and family having always resided in London.

The motion to change the venue was refused by the Master in Chambers, and the defendant appealed.

The appeal was heard by ROSE, J., in Chambers, on the 21st September, 1900.

W. H. Blake, for the defendant.

Cattanach, for the plaintiff.

Judgment was delivered on the following day.

ROSE, J.—I remain of the opinion formed on the argument that the residence of the plaintiff at the time of the delivery of the statement of claim, and not at the time of the issue of the writ of summons, is the time referred to in sub-sec. (b) of Con. Rule 529*, and that the appeal must be dismissed with costs in the cause to the plaintiff in any event.

As I was told that this is the first case in which the Rule has been considered on this point, I have conferred with the Chief Justice of the Common Pleas, and he permits me to say that his opinion is the same as that I have expressed.

* 529.—(1) Subject to any special statutory provisions the place of trial of any action shall be regulated as follows :

(a) The plaintiff shall, in his statement of claim, name the county town at which he proposes that the action shall be tried.

(b) Where the cause of action arose and the parties reside in the same county the place so to be named shall be the county town of that county.

RE REDDOCK AND CITY OF TORONTO.

Appeal—Leave—Judicature Act, sec. 77.

Where a motion to quash a municipal by-law was refused by the Judge who heard it, and his order affirmed by a Divisional Court, an application for leave for a further appeal was dismissed :—

Held, that under sec. 77 (4) (e) of the Judicature Act, upon such an application for leave, it must appear that there is some reasonable ground for doubting the soundness of the judgment, and in addition thereto that special reasons exist for taking a case out of the general rule which forbids more than one appeal to the same party.

[September 28, 1900.—*Osler, J.A.*]

Motion by the applicant for leave to appeal to the Court of Appeal from an order of a Divisional Court dismissing his appeal from an order of STREET, J., in the Weekly Court, dismissing a motion to quash a by-law of the corporation of the city of Toronto made under sec. 44 of the Shop Regulation Act, R.S.O. 1897 ch. 257.

The motion was heard by OSLER, J.A., in Chambers, on the 20th September, 1900.

F. E. Hodgins, for the applicant.

Fullerton, Q.C., for the city corporation.

Judgment was delivered on the 28th September, 1900.

OSLER, J.A.—The applicant is bound to make out a case for granting leave under the last clause of sec. 77 of the Judicature Act, namely, that the case is not only “a proper case for the granting of the leave,” but also that “there are other sufficient special reasons for treating the case as exceptional and allowing a further appeal.”

In other words, it must appear that there is some reasonable ground for doubting the soundness of the judgment, or that the case is a difficult one on the facts or the law, and in addition thereto that special reasons exist for taking it out of the general rule which forbids more

than one appeal to the same party: *Medley v. Medley* (1882), 51 L.J. P. 74, 77.

[The learned Judge then discussed the objections raised to the by-law, which was of the kind generally known as an "early closing by-law," and was of opinion that it was passed by the council, in good faith, on its own initiative, under the discretionary power in sub-sec. 2 of sec. 44, and not compulsorily upon application of the classes affected thereby under sub-sec. 3 of that section, and that it was unnecessary for the council to give notice of its intention to pass the by-law, to those affected. He concluded:]

On the whole, I cannot say that I entertain any reasonable doubt that leave to appeal further ought to be refused.

MCKIM V. TOWNSHIP OF EAST LUTHER.

Local Masters—Jurisdiction—Referring Actions to Drainage Referee.

A local Master of the High Court has jurisdiction, by virtue of Rules 42 and 49—see also Rule 6 (a)—to make an order, under sec. 94 of the Municipal Drainage Act, R.S.O. 1897 ch. 226, referring an action brought in his county to the Referee under the Drainage Laws.

[September 19, 1900.—*Court of Appeal.*]

APPEAL by the defendants from a judgment or report of the Drainage Referee.

The action was brought to recover damages alleged to have resulted from the want of repair of a drain, and for a mandamus.

Upon the appeal coming on for argument on the 4th June, 1900, before OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., the first ground taken by the appellants was that

the order of reference was invalid. Judgment was reserved as to this point after argument.

Mabee, Q.C., for the appellants.

Matthew Wilson, Q.C., for the respondent.

On the 19th September, 1900, the judgment of the Court was delivered by

OSLER, J.A.—The proceedings before the Referee were taken under an order dated the 9th January, 1899, made on the application of the plaintiff, whereby, upon hearing read the affidavits filed and the exhibits therein referred to, and upon hearing counsel for the parties, and it appearing that the action might be more conveniently tried and disposed of by the Referee, it was ordered that the action should be and the same was thereby referred to Thomas Hodgins, Esquire, Referee under the Drainage Laws.

It was further ordered that the costs of the action and of the motion and of the reference should be in the discretion of the Referee.

The order was made by the local Master of the High Court at Guelph, the county town of the county in which the action was brought.

On the opening of the appeal the objection was urged that the Referee had no jurisdiction or authority over the subject-matter of the action, because the local Master at Guelph had no authority or jurisdiction to make the order of the 9th January, 1899, and, therefore, that all the proceedings before the Referee were *coram non judice* and void.

We directed that the hearing of the appeal should stand over until we had considered this objection, because, however unreasonable may be the conduct of the appellants in taking it for the first time at this stage of the proceedings, it strikes, if well founded, at the root of our jurisdiction to entertain the appeal. The consequence of

that would be, however, little as it may have been anticipated by the appellants, that it would be left to them to take such other proceedings elsewhere as they might be advised in order to get rid of the report.

From the terms in which the order is framed it is evident that it was intended to be made under the 94th section of the Drainage Act, R.S.O. 1897 ch. 226, and the local Master's authority to make it, if any he had, was derived under that section and the Rules made under the Judicature Act prescribing his jurisdiction to deal with actions pending in the High Court.

The 94th section, which is a consolidation of the corresponding section of the Drainage Act of 1894, 57 Vict. ch. 56, enacts that where an action for damages is brought and in the opinion of *the Court in which it is brought or of a Judge thereof*, the proper proceeding is under the Act—that is to say, that it should have been taken by way of appeal under sec. 93, without action, directly to the Referee—or that the action may be more conveniently tried before and disposed of by the Referee—that is to say, where the matters in question are legitimately the subject of an action—*the Court or Judge* may, on the application of either party or otherwise, *and at any stage of the action*, make an order transferring or referring it to the Referee, and should no application or order be made as aforesaid, *the Court or Judge* shall have jurisdiction to try the action subject to appeal, and such jurisdiction shall include all the relief within the powers granted by the Act to the Referee as well as those of the High Court.

The intention of the Legislature in passing this section, as has frequently been pointed out, was, that in prosecuting a demand for compensation or damages a claimant should no longer be liable to be defeated merely because he had commenced his proceedings by action instead as formerly by arbitration or by a direct appeal to the Referee: *Township of Ellice v. Hiles* (1894), 23 S.C.R. 429; *Thackery v. Township of Raleigh* (1898), 25 A.R. 226, 231.

Whatever may be the subject of the demand, if it has been sought by way of action, it may now be sent to the Referee or may be disposed of by trial in the ordinary way.

In the present case the plaintiff's demand seems to be an actionable one.

By Rule 42 it is provided, that the Master in Chambers in regard to all actions brought in the High Court, shall be and he is thereby empowered and required to do all such things, transact all such business, and exercise all such authority and jurisdiction in respect to the same as are now done, transacted, or exercised by any Judge of the said Court sitting at Chambers, save and except in respect to certain excepted matters, one of which is the making of orders for references (except by consent) under the Arbitration Act.

And by Rule 49 it is provided that the local Master shall, in all actions brought in his county, have concurrent jurisdiction with and the same power and authority as the Master in Chambers has in all proceedings now taken in Chambers at Toronto, with certain further exceptions.

And see also Rule 6 (*a*).

These Rules have the force and authority of a statute: 59 Vict. ch. 18, secs. 13, 14, 15; O.J. Act, R.S.O. 1897 ch. 51, sec. 129.

It does not admit of doubt that such an order as the one in question might have been made by a Judge in Chambers under the first branch of sec. 94: "Where . . . in the opinion of the Court . . . or of a Judge thereof, etc., . . . the Court or Judge may . . . at any stage of the action" (and therefore not at the trial stage only) "make an order," etc.

In *Dallow v. Garrold* (1884), as reported in 54 L.J. Q.B. 76, Brett, M.R., says at p. 78: "It is well recognized that that phrase always includes a Judge at Chambers, unless there is some express enactment limiting the meaning of the phrase:" and I would add unless it is used in reference to

some function which a Judge sitting at Chambers does not exercise. See also *Baker v. Oakes* (1877), 2 Q.B.D. 171, 175, and *In re B*——, [1892] 1 Ch. 463, which shew that it has the same meaning when used in the Rules. Then, as the order is one which at the time the Rules came into force a Judge sitting in Chambers might have made, and is not an order for reference under the Arbitration Act, having been made under the authority of sec. 94, and is not otherwise excepted from the jurisdiction of the Master in Chambers or local Master, and was made in an action brought in the county for which the local Master was appointed, the jurisdiction of the latter to make it under the authority of the Rules above cited was, I think, complete.

It has been said, however, that the jurisdiction conferred by these Rules upon the local Master cannot extend to authorize him to act under the first branch of sec. 94, because in the latter part of the section the same phrase "Court or Judge" is used in reference to the trial of the action, a jurisdiction which the officer cannot exercise, which shews that the intention of the Legislature was, that the order when made by a Judge should be made only by a Judge who could try the action.

I think there is nothing in this point. The words in the latter part of the section are not "such Court or Judge," as if referring to the same words in the earlier part, but simply, "should no application or order be made *the Court or Judge* shall have jurisdiction to try the action," etc. But it is not necessary to lay much stress upon this. The two branches of the section deal with different powers of the Court or Judge: one, the making of orders "at any stage" of the action, and the other, the trial of the action. And when in the latter branch it is said that the Court or Judge shall have jurisdiction to try the action it is evident that the functions of a trial Judge or Court under secs. 46 and 65 of the Judicature Act are meant, as distinguished from those of a Judge in Chambers.

While the latter may be exercised by the Judge, there is no reason why they may not also be exercised by the judicial officer, or for holding that his power to act under the first branch of the section is circumscribed by the fact that he has none under the second.

I am of opinion, therefore, that the Drainage Referee was lawfully seized of the case, and that the appeal from his report is competent and must be heard upon the merits.

See *Coyne v. Lee* (1887), 14 A.R. 503; *Clancey v. Young* (1893), 15 P.R. 248; *Teskey v. Neil* (1893), *ib.* 244; *Burgess v. Morton*, [1896] A.C. 136; *Moore v. Gamgee* (1890), 25 Q.B.D. 244; *In re Burrowes* (1868), 18 C.P. 493; *Crawford v. Township of Ellice* (1898), 35 C.L.J. 391, 19 C.L.T. Occ. N. 196.

Objection overruled.

SUPREME COURT OF THE INDEPENDENT ORDER OF
FORESTERS V. PEGG ET UX.

Mortgage — Foreclosure — Mortgagee in Possession — Account of Rents — New day — Final order — Rights of Purchaser after Decree — Parties — Power of Sale.

Mortgagees had been in possession of several of the parcels of land comprised in their mortgage before they commenced an action for foreclosure. In that action the usual judgment was pronounced, and while the reference thereunder was pending the plaintiffs agreed to sell some of the parcels to B. in case the mortgagors should not redeem; and B. went into possession. The Master made his report on the 13th February, 1900, fixing the 14th August, 1900, as the day for redemption, and ascertaining the amount due by the defendants up to that day. On the 15th May an order was made amending the report by deducting amounts received by the plaintiffs for rent, and directing that any other rents received up to that time should be credited on the final adjustment. On the 15th August the defendants applied for a new day, when the plaintiffs stated on affidavit that sums paid by them for taxes and costs more than exhausted the rents received since the date of the report. No other statement was made by the plaintiffs. The application was refused, and on the 17th August a final order of foreclosure was granted:—

Held, that the statement of the plaintiffs was insufficient; the mortgagor, before a final order of foreclosure is made, is entitled to know how much he must pay in order that he may redeem; and the modes in which that amount may be ascertained, where it has been changed after report, are pointed out in Rule 387.

Held, also, that a purchaser who has purchased during the pendency of foreclosure proceedings, and whose rights are expressly subject to the termination of the proceedings by a final order of the Court in favour of the mortgagee, stands in a different position from one who comes in for the first time after a final order has been made, and is much more readily made subject to the discretion of the Court to open the foreclosure.

Campbell v. Holyland (1877), 7 Ch. D. 166, and *Johnston v. Johnston* (1882), 9 P. R. 259, followed.

Gunn v. Doble (1869), 15 Gr. 655, distinguished.

In this case the mortgagors were in no default, an examination of the proceedings in the part of the purchaser would have shewn him that the mortgagors had never been properly foreclosed, and that no day had ever been fixed for payment of the balance due to the mortgagees. But he did not even ask whether a final order had been obtained, which was the condition upon which his sale was to be carried out:—

Held, therefore, that the mortgagors had clear rights to redeem; and, having come in promptly for relief and taken vigorous steps to assert their rights, they were entitled to have the final order of foreclosure set aside, a new account taken and a new day fixed, and to redeem both as against the plaintiffs and B., for which purpose the latter should be added as a party.

Held, lastly, that the sale to B. was not, under the circumstances, sustainable under the power of sale contained in the plaintiffs' mortgage.

Kelly v. Imperial Loan Co. (1885), 11 S.C.R. 516, distinguished.

[September 29, 1900.—*Divisional Court.*]

THIS action was brought for foreclosure in respect of a mortgage from the defendants to the plaintiffs, upon several parcels of land in the county of York. Before action the plaintiffs had taken possession as mortgagees of several of the parcels covered by the mortgage. The usual foreclosure judgment was obtained in due course, with a reference to the Master in Ordinary to take the usual accounts, and the judgment was carried into his office.

On the 6th December, 1899, pending the proceedings under the reference, and before any report, the plaintiffs and one Lloyd, a solicitor practising at Newmarket, as the vendors, contracted with one Walter F. Blanchard, a farmer, to sell him certain parcels of the mortgaged premises for \$13,350, in case the mortgagors should fail to redeem. The contract was in writing, and recited the foreclosure proceedings; it provided that the contract was to be null and void in case the mortgagors should redeem, that the purchaser should have possession fourteen days after the contract, but that he was not to be entitled to his conveyance until after a final order of foreclosure had been made. There was a further provision that, in case the mortgagors should redeem, the vendor Lloyd should repay to Blanchard all moneys properly expended by him in repairs and for putting in his crops. Blanchard was to pay his purchase money as follows: \$3,350 in cash upon receiving conveyance, and the balance to be secured by mortgage upon the property. The purchaser entered into possession. The Master's report was made on the 13th February, 1900, finding the sum of \$39,997.34 due, including costs, and after computing interest to the 14th August, 1900, being the date fixed for redemption.

On the 15th May, 1900, an order was made by the Master in Chambers, upon the consent of the defendants, that the report of the Master in Ordinary should be

amended "by deducting from the said report the following amounts:—

"\$350 and interest from 1st January, 1900, being the amount of Cane rent.

"\$50 and interest from 1st November, 1899, being the amount of the Evans rent.

"\$150 and interest from 1st March, 1900, being further payment of Evans rent.

"\$2,665.50, being an error in computation, with \$66.63 interest on same.

"\$300, being the amount of Matheson rent.

And that the following amounts be added to the said report:—

"\$335, being the premium on a policy in the Canada Life Assurance Co., and interest from 15th February, 1900.

"\$94.50, being arrears of taxes paid by plaintiffs and interest from May 17th, 1900."

The order then proceeded as follows: "And it is further ordered that any rents (if any) received by the plaintiffs up to the present time, other than those above mentioned, since the date of said report, *are to be credited on the final adjustment*; and it is further ordered that the said report is to be amended *nunc pro tunc*."

On the 16th June, 1900, the Master in Ordinary granted a certificate that the amount due to the plaintiffs on the 13th February, 1900, for principal, interest, and costs, was \$36,055.94. This, presumably, was the calculation made after computing the alterations made in the report by the order of the 15th May, 1900. This certificate was made *ex parte* at the request of the plaintiffs' solicitors, in order that they might issue execution for the amount.

On the 14th or 15th August, 1900, the defendants applied to Mr. McAndrew, an official referee, sitting for the Master in Chambers, on notice to the plaintiffs, to appoint a new day for the payment of the mortgage money, by reason of alterations in the state of the account, or to ex-

tend the time for payment. This application was supported by the affidavit of the defendant W. W. Pegg that the mortgagors were entitled to credit for certain sums received by the plaintiffs in respect of the rents or occupation of the lands since the taking of the accounts: that he had arranged to sell, for \$14,000, to one McCormick, the lands which the plaintiffs had agreed to sell to Blanchard for \$13,350, and to raise the balance due the plaintiffs from one Holborne; and that the mortgaged premises were worth much more than the amount due the plaintiffs. There was also an affidavit from Holborne to the effect that he was able and willing to purchase the whole of the said mortgaged lands at a sum sufficient to pay the plaintiffs' claim, but wished for a few days' time to raise the amount. The Supreme Secretary of the plaintiffs made an affidavit in answer, in which he admitted the receipt of rents and other moneys since the date of the certificate of the 16th June, 1900, without stating the amount received, but stated, without giving figures, that the taxes upon the lands and certain costs incurred by the mortgagees more than exhausted the amounts so received.

The Referee, upon hearing these affidavits, refused to order any further accounts or new day to be fixed, and refused to extend the time for redemption.

The plaintiffs filed an affidavit of non-payment of \$36,836.34, being the amount found due to the plaintiffs by the amended report, and they stated that certain rents had been received, but that they did not reduce the amount found due by reason of certain taxes and other outgoings, repairs, etc.; they also filed the usual bank manager's certificate: and thereupon MACMAHON, J., in Chambers, on the 17th August, 1900, ordered that a final order of foreclosure should be issued. In the meantime the defendants had applied to the Master in Ordinary and obtained from him and served on the 15th August, 1900, on the plaintiffs' solicitors, a direction that they should produce before him

on the 21st August, 1900, a detailed statement of their receipts and disbursements in connection with the mortgaged premises since the 14th February, 1900, and that in the meantime the issue of the final order of foreclosure should be stayed. On the 17th August, 1900, the plaintiffs' solicitors applied to MACMAHON, J., and he ordered the stay upon the issue of the final order of foreclosure to be removed and the final order to be issued. The defendants then brought an action against the mortgagees, claiming to be entitled to redeem, and registered a *lis pendens* to prevent their dealing with the property pending their further proceedings in the present action. They then appealed from the order of Mr. McAndrew refusing to appoint a new day, and at the same time asked by a substantive motion for an order appointing a new day, and setting aside the final order of foreclosure.

The appeal and motion came on before MACMAHON, J., sitting in Chambers, on the 1st September, 1900, for argument, and on the 4th September he dismissed the appeal and motion, delivering the following judgment:

"The plaintiffs, the mortgagees, have received no moneys to be applied in reduction of the mortgage. Some rents were received, which were insufficient to pay the taxes on the property. The mortgagees have been in possession of the property and have been dealing with it as their own, and I do not think it is a case in which the mortgagor is entitled to have a new day named."

The defendants then appealed to a Divisional Court, and upon the appeal coming up they were given leave to add the purchaser Blanchard as a party to their motion, and to move in their new action as well as in the present one.

The amended motion was heard before the Divisional Court (FALCONBRIDGE, C. J., and STREET, J.,) on the 14th September, 1900.

Upon the argument of the appeal further evidence on both sides was put in. The purchaser Blanchard swore that on the 31st August, 1900, he had paid to Lloyd for the plaintiffs \$2,000, and given them a mortgage for \$11,500. He was cross-examined upon his affidavit, and his cross-examination was produced. He had made no investigation of the title, and had closed the matter as above upon being informed by Lloyd that the mortgage money had not been paid. He swore that he had no knowledge of the proceedings in Toronto taken by the defendants to obtain an extension of time for payment. He did not explain the variation between the terms of his contract to purchase and the manner in which it was carried out, nor the increase in the price paid by him from \$13,350 to \$13,500. No affidavit was filed by the plaintiffs upon the motion. An ordinary unregistered statutory conveyance from them to Blanchard, dated the 31st August, 1900, was handed in, after the argument, by the plaintiffs.

W. H. Blake and S. B. Woods, for the defendants.

Aylesworth, Q.C., for Blanchard.

J. Bicknell, for the plaintiffs.

On the 29th September, 1900, the judgment of the Court was delivered by

STREET, J. (who, after stating the facts as above, proceeded)—I think there is no doubt that the final order of foreclosure issued in this action has been issued improvidently and contrary to the long and well established practice of the Court in such cases.

The plaintiffs were mortgagees in possession of a number of properties covered by the mortgage, and they have never presented to the Court, as they are bound to do, a detailed statement of the rents and other moneys received by them applicable to the mortgage debt, and of the moneys for which they claimed credit as against the rents and profits with which they are chargeable. The accounts

which they have submitted from time to time are admittedly incomplete; they admit that the state of the mortgage account has been changed by the receipt of rents and other moneys since the last account was taken between them and the mortgagors; they produce no account of these moneys nor of the sums with which they are willing to be charged in respect of them, nor of the payments which they seek to set off against them, but content themselves with a vague and general statement that the result of their receipts and disbursements has not reduced the amount due them. Such a statement is clearly insufficient. The mortgagor, before a final order of foreclosure is made, is entitled to know how much he must pay in order that he may redeem. The practice provides (Rule 387) two modes in which the amount may be ascertained, where it has been changed after the making of the report by the receipt of rents and profits by the mortgagee, viz., either by a new reference to ascertain the corrected amount, or by a notice from the mortgagee to the mortgagor, before the time fixed for redemption of the amount he is willing to allow in respect of his receipts and disbursements and of the balance he claims as remaining due. Neither course was taken by the mortgagees in the present case, and the amount which the mortgagors were to pay in order to redeem has never yet been ascertained. Furthermore, the mortgagors swear that they always understood that a further account would be had, and their belief, apart from the well known practice of the Court, is warranted by the final clause of the order of the 15th May, 1900, which expressly contemplates and provides for a further and final accounting and adjustment.

The mortgagees, however, and Blanchard, who claims as purchaser from them, insist that the sale to Blanchard cannot be disturbed and must be upheld, notwithstanding any defects in the foreclosure proceedings, upon two grounds:—first, that he is a *bonâ fide* purchaser for value who has paid part of his purchase money and carried out

his purchase by giving a mortgage and taking a conveyance; and second, that the conveyance to him is good under the power of sale in their mortgage from Pegg, apart altogether from the foreclosure proceedings.

With regard to the claim of Blanchard as a purchaser, it is to be observed that he entered into possession of the property under a contract which carefully sets forth the pending foreclosure proceedings, and the right of the mortgagors to redeem under them, and provides that he is not to be entitled to have the property conveyed to him until a final order of foreclosure shall have been made. He was informed by Lloyd, who was one of the vendors, that the mortgage money had not been paid on the 14th August, 1900, being the day fixed for payment, and he supposed from that information that the persons with whom he had contracted could make him a conveyance. He employed no solicitor and made no inquiry or investigation, but simply handed to Lloyd his cheque for \$2,000, and executed a mortgage for \$11,500; he has never seen any conveyance, nor was any conveyance produced at the argument. There is no affidavit from Lloyd or the mortgagees, or any officer of theirs, stating that the position of the matter has been changed in any way since the 14th August, 1900; a conveyance to Blanchard from the mortgagees, and a mortgage back from him to them have been handed in by the mortgagees since the argument. The evidence in fact is limited to what we are told by Blanchard, viz., that some sixteen days after he had been told by Lloyd that the mortgage money had not been paid, he handed to him a cheque for \$2,000, and executed a mortgage for \$11,500, and to what we can gather from the production to us by the mortgagees since the argument of deed and mortgage without any explanation whatever. Under these circumstances, I should feel a great deal of hesitation in coming to the conclusion that any change had really taken place in the position of Blanchard with

regard to the mortgagees since the 14th August, 1900, because it would have been so very easy for the mortgagees, whose head office is in Toronto, or for their solicitors having the conduct of the affair, to say so shortly by affidavit, had the sale to Blanchard been actually carried out.

The principles, however, which are applicable to the undisputed position of the plaintiffs, the defendants, and Blanchard, do not require a determination of this question. Blanchard entered into the contract with the plaintiffs, under which he took possession of the land, expressly subject to the defendants' right to redeem, and with full notice of the pending foreclosure proceedings; he accepted a stipulation that he should not be entitled to a conveyance until a final order of foreclosure had been obtained. The right of the Court to allow a mortgagor in to redeem after a final order of foreclosure has been granted is always a matter resting in its judicial discretion, and may be exercised even after a sale by the mortgagee to a purchaser, for purchasers are charged with knowledge of the right of the Court to exercise its discretion: *Campbell v. Holyland* (1877), 7 Ch. D. 166; *Johnston v. Johnston* (1882), 9 P.R. 259.

It is not necessary that I should attempt any definition of the limits beyond which the Court will not go in allowing a mortgagor in to redeem after a sale to a *bonâ fide* purchaser. It is plain from the case to which I have referred that a purchaser who has purchased during the pendency of foreclosure proceedings, and whose rights are expressly subject to the termination of the proceedings by a final order of the Court in favour of the mortgagee, stands in a different position from one who comes in for the first time after a final order has been made, and is much more readily made subject to the discretion of the Court to open the foreclosure. Upon this ground the present case is distinguishable from *Gunn v. Doble* (1869),

15 Gr. 655. Here the mortgagors are in no default; the slightest examination of the proceedings on the part of the purchaser would have shewn him that the mortgagors had never been properly foreclosed, and that no day had ever been fixed for the payment of the balance due the mortgagees. But he did not even ask whether a final order had been obtained, which was the condition upon which his sale was to be carried out.

The mortgagors have clear rights to redeem; they have come in promptly for relief, and have taken vigorous steps to assert their rights; and, in my opinion, they are entitled to have the final order of foreclosure set aside, to have a new account taken and a new day fixed, and to redeem both as against the plaintiffs and Blanchard. For this purpose I think it will be proper that Blanchard should be added as a party defendant in this action, as was done under similar circumstances with regard to the purchaser in *Campbell v. Holyland*, above referred to.

The other objection to the right of the mortgagors to redeem, so far as Blanchard is concerned, is that the sale to him is at all events sustainable under the power of sale in the mortgage, and the decision in *Kelly v. Imperial Loan Co.* (1885), 11 S.C.R. 516. The circumstances here sufficiently distinguish the present case, in my opinion, from the principle of that decision. It would be an improper exercise of a power of sale for a mortgagee prosecuting a foreclosure suit to sell under proceedings taken under the power of sale before the institution of the suit, for the mortgagor would be entitled to assume that those proceedings were suspended during the continuance of the foreclosure suit, and a sale under such circumstances could not be supported even in favour of a purchaser if he had notice of them. There was abundant notice to the purchaser here; it is clear he not only knew of the foreclosure proceedings but was looking to their termination for his title. In *Kelly v. Imperial Loan Co.* the purchase

took place some three years after the final order of foreclosure, and the purchaser, although his conveyance recited a title under the foreclosure proceedings only, was permitted to set up a title under the power of sale as well. The foreclosure proceedings had therefore long since terminated, and the majority of the Court considered that at the time of the sale to the purchaser there would have been no impropriety in the mortgagee exercising his power of sale.

The motion to set aside the final order of foreclosure and the appeals will therefore be allowed with costs here and below. The purchaser Blanchard will be added as a party defendant to this action, and there will be a reference to the Master in Ordinary to take the subsequent accounts and to fix a new day for redemption according to the practice of the Court. The purchaser Blanchard, being in the position of a derivative assignee of the plaintiffs' mortgage, to the extent of the purchase money, if any, paid by him to the mortgagees, is entitled to have an account taken of it if he desires it, and to receive it out of the money paid in, in case of redemption.

The motion which was combined with the present one in the suit of *Pegg v. Supreme Court of the Independent Order of Foresters* is dismissed, but, under the circumstances, without costs.

GIBSON V. NELSON.

Notice of Trial—Close of Pleadings—Rule 262.

A reply delivered by the plaintiff joining issue upon the statement of defence, and further alleging that the facts set forth in the defence were no answer to the claim :—

Held, a joinder of issue “simply, without adding any further or other pleading thereto,” within the meaning of Rule 262; and therefore that when it was delivered the pleadings were closed, and a notice of trial thereupon served was regular.

[October 16, 1900.—*Meredith, C.J.*]

THIS was an appeal by the defendant from an order of the local Judge at Stratford dismissing the appellant's motion to set aside a notice of trial served by the plaintiff, on the ground that it was served before the pleadings were closed, under the circumstances set out in the judgment.

Rule 530—After the close of the pleadings either party may give notice of trial.

Rule 262—As soon as either party has joined issue upon any pleading of the opposite party simply, without adding any further or other pleading thereto, or as soon as the time for amending the pleadings under these Rules or under any order, or for delivering a reply or subsequent pleading, has expired, the pleadings as between such parties shall be deemed to be closed without any joinder of issue being pleaded by any or either party.

The appeal was heard by MEREDITH, C.J., in Chambers, on the 15th October, 1900.

J. H. Moss, for the defendant.

D. L. McCarthy, for the plaintiff.

Judgment was delivered on the following day.

MEREDITH, C.J.—The question presented for decision depends upon the construction to be placed on Con. Rule

262, and arises on the following state of facts. The action is one for redemption, and the statement of defence was delivered on the 17th September last, and on the 27th of the same month the plaintiff delivered her reply, which is as follows :—

1. The plaintiff joins issue upon the statement of defence herein.

2. And the plaintiff further says that the facts, if any, set forth in the said statement of defence form no answer to the plaintiff's claim.

And thereupon the plaintiff served the notice of trial which the defendant is seeking to set aside.

It is contended by the appellant that the reply is, by reason of the second paragraph of it, not a joinder of issue "simply, without adding any further or other pleading thereto," within the meaning of the Rule, and that the pleadings were, therefore, not closed by the delivery of it.

This contention is not, in my opinion, well founded. It may be true that, in a certain sense, the statements contained in paragraph 2 constitute a pleading, a party being allowed by Con. Rule 259 "to raise by his pleading any point of law ;" but not, I think, in the sense in which the word "pleading" is used in Rule 262.

By the statement of defence the defendant set up as an answer to the claim of the plaintiff certain alleged facts which she contended constituted an answer to the claim, and what the plaintiff in substance has done by his reply is to traverse in general terms the statements of fact pleaded and to take issue on the statement of defence as an answer in law to her claim.

Looking at the object of Rule 262, it is manifest that it was intended that whenever the pleadings came to that point that no further facts were pleaded by the party who had last pleaded, but he had confined his pleading to a traverse of the facts last before pleaded by his adversary, the cause should be ripe for trial, and the parties at liberty

to serve notice of trial. This is provided for by the first branch of the Rule, and the second branch of it deals with cases in which the last pleading delivered introduces new facts and the opposite party does not deliver any further pleading within the time allowed for that purpose.

It is plain, I think, that there was no further or other pleading which the defendant could deliver. Demurrers having been abolished, the second paragraph of the reply could not be treated as a demurrer, and the defendant be entitled to file a joinder in demurrer as under the former system of pleading would have been her proper course.

Even if the reply is not within the letter of Rule 262—as I think it is—it is clearly within the spirit of it, and in construing the Rules I am not disposed to put a narrow construction on them, and, unless the language admits of no other interpretation, to adopt one that leads to no practical advantage, and to a result which, I am satisfied, was not contemplated by the framers of the Rules.

The appeal is dismissed, and the costs of it will be to the plaintiff in any event.

HALL v. BOWERMAN ET AL.

Interpleader—Writ of Possession—Interference with Execution—Claim to Land—Costs.

Upon an attempt to execute a writ of possession under a judgment against G., who was in actual possession, the sheriff was served with a notice by B. claiming the land mentioned in the writ, and informing the sheriff that the house standing thereon was locked and that he (B.) had the key. B.'s claim was as mortgagee upon default in payment of interest:—

Semble, that the sheriff's duty, as soon as he received the writ, was to break open the door and give the plaintiff possession. But

Held, that, as the sheriff was not bound to consider the legality of the claim put forward, he was entitled to an interpleader order.

Costs of the sheriff ordered to be paid in the first instance by the party putting him in motion.

[July 5, 1900.—*The Master in Chambers.*]

An application on behalf of the sheriff of Toronto for an interpleader order. The facts are stated in the judgment.

The application was heard by the Master in Chambers on the 2nd July.

R. J. MacLennan, for the sheriff.

E. D. Armour, Q.C., for the plaintiff.

G. W. Holmes, for the defendant Bowerman.

The following authorities were referred to in a memorandum submitted by counsel for the sheriff after the argument: *Darling v. Collatton* (1883), 10 P.R. 110; *Holt v. Frost* (1858), 3 H. & N. 821; *Supreme Commandery, &c.*, v. *Merrick* (1895), 163 Mass. 374; *Emerson v. Humphries* (1892), 15 P.R. 84; *Adamson v. Adamson* (1887), 12 P.R. at p. 23; *Day v. Carr* (1852) 7 Ex. 883; *Goslin v. Tune* (1846), 2 U.C.R. 177; *Wells v. Hews* (1876), 24 Gr. 131; *Stern v. Tegner*, [1898] 1 Q.B. 37; *Smith v. Darlow* (1884), 26 Ch.D. 605; *Todd v. McKeevir*, [1895] 2 I.R. 400; *Ashdown v. Nash* (1885), 3 Man. L.R. 37; *Brown v. Nelson* (1884), 10 P.R. 421; Am. and Eng. Encyc. of Law, 2nd

ed., vol. 10, p. 489; Armour on Titles, 2nd ed., p. 23; Taschereau's Criminal Code, p. 25; Freeman on Executions, 3rd ed., secs. 472, 474, 475.

Judgment was delivered on the 5th July, 1900.

THE MASTER IN CHAMBERS.—The action was one for possession by a purchaser of a house and lot in Toronto against the vendor, Bowerman, and one Genereux, who was in actual possession. The defendant Bowerman entered an appearance, but judgment was obtained by default against Genereux, and, after proceedings taken, a writ of possession was issued against Genereux, and handed to the sheriff for execution. Upon the sheriff attempting to execute the writ, he was served with a notice by Bowerman claiming the house, and informing the sheriff that it was locked and he had the key.

The sheriff applies for an interpleader order in consequence.

In the meantime Bowerman moved to set aside the writ or order for possession; but, as it was not against him or any one claiming under him, his application was refused. He claims to be entitled to possession of the premises by reason of the plaintiff's default in non-payment of the interest due on the mortgage by the plaintiff to him, and it was in consequence of this default that he took forcible possession of the house and locked it up.

Upon this application counsel for the sheriff argued that the sheriff, finding the door locked, could not give up possession to the plaintiff.

I am of opinion that the sheriff's duty was to break open the door under the writ of possession and give the plaintiff possession; and this, I think, he should have done as soon as he received the writ: *Semayne's Case* (1604), 3 Coke 188. But, as the sheriff is not bound to consider the legality of the claim put forward by the claimant: *Doran*

v. *Toronto Suspender Co.* (1890), 14 P.R. at p. 105: but is at liberty to seek relief from the claim by applying for an interpleader, I am of opinion that in the present case he is entitled to the order asked for.

The question of right of possession will be disposed of in the present action. The writ of possession will be stayed until that question is finally disposed of. The costs of the application will be paid to the sheriff by the plaintiff in the first instance; to be finally disposed of by the trial Judge, or, if not, then in Chambers.

The order was as follows:—

1. That all further proceedings under the writ of possession, including the return of the writ, be stayed until further order.

2. That the question of the right of possession, as between the plaintiff and the claimant Bowerman, to the lands referred to in the writ of possession, shall be disposed of in the pending action.

3. That no action shall be brought against the sheriff for anything done or omitted to be done by him under the writ of possession or in respect thereto.

4. That the costs of the sheriff shall be paid in the first instance, forthwith after taxation, by the plaintiff.

5. That the question of costs as between the plaintiff and the claimant, including the question whether the claimant should not reimburse the execution creditor in case the latter is successful, and all further and other questions, be reserved to be disposed of by the Judge at the trial, and, if not so disposed of by him, then in Chambers.

RE BEATY ET AL., SOLICITORS.

Solicitor—Bills of Costs—Taxation—Payment—Connected Charges—Agreement—Unsigned Bills—Delay—Overcharges.

A firm of solicitors for about eight years acted for an estate in the collection of moneys and realization of securities relating to a block of land sold by the testator. During this period the solicitors from time to time rendered statements of account to the executors and paid them cheques for balances in their hands as shewn by such statements, and also rendered detailed bills of their costs for their services, in respect of different actions and proceedings taken, though not in all cases, such bills being paid by the retention by the solicitors, without objection on the part of the executors, of part of the moneys collected. Two or three of the larger bills were moderated by a taxing officer shortly after they were rendered. Upon an application by the executors for taxation of all the bills after the eight years :—

Held, that this could not be regarded as one continuous dealing keeping the right to tax in suspense till the collection or exhaustion of all the securities.

Held, also, upon the evidence, that there was no agreement between the solicitors that the right to tax generally should remain open to the executors.

As to certain of the bills of costs said not to have been actually signed by the solicitors :—

Held, that they were substantially sufficient, and, after being paid out of the funds collected, with the knowledge and sanction of the executors, they could not be treated as open to taxation, after years of delay and no specific overcharges being indicated.

In re Sutton and Elliott (1883), 11 Q.B.D. 377, followed.

[July 12, 1900.—*The Master in Chambers.*]

[November 2, 1900.—*Boyd, C.*]

THIS was an application by the trustees and executors under the will of the late Sir Adam Wilson for an order for taxation of bills of costs of the solicitors for the estate, under the circumstances mentioned in the judgment of the Master in Chambers, before whom the motion was heard on the 9th June, 1900.

J. H. Moss, for the applicants.

W. E. Middleton, for the solicitors.

Judgment was delivered on the 12th July, 1900.

THE MASTER IN CHAMBERS.—Application on behalf of the trustees under the will of the late Sir Adam Wilson

for the taxation of costs of the solicitors of the estate in connection with a certain agreement entered into by the late Sir Adam Wilson and A. W. Burk and his wife, M. B. Burk, dated the 2nd December, 1891. It appears that Mr. Burk had purchased a property from Sir Adam Wilson, and laid it out into a large number of lots; he gave a mortgage back to secure the purchase money; he began disposing of the lots and receiving part of the purchase money, and taking second mortgages on the lots. Failing to meet his obligation to Sir Adam Wilson, he entered into the above referred to agreement, and in it the following provision was made:—"1. The said party of the first part (Sir Adam Wilson) shall be at liberty to hand over the collection of the said securities to Messrs. Beaty, Hamilton, & Snow, of the city of Toronto, solicitors, with full power to them to receive the moneys secured thereby, and give good and valid receipts, acquittances, and discharges therefor; and, out of the said moneys collected by them on said securities, pay them a commission of four per cent. on all interest moneys, and one per cent. on all principal moneys, and their conveyancing charges, taxable costs in actions or suits, as between solicitor and client, whether successful or not. 2. Out of the moneys collected as aforesaid, the said party of the first part shall be at liberty to deduct"—then follows a statement of what Sir Adam Wilson was to be at liberty to deduct, including all charges for necessary proceedings of whatever nature or kind in relation to the said lands and premises, and then the balance was to be applied to the reduction of Mr. Burk's indebtedness to Sir Adam Wilson in connection with the said property.

Upon the death of Sir Adam Wilson, the Trusts Corporation of Ontario were appointed his executors; the solicitors, Beaty, Hamilton, & Snow, continued to act as such under the terms of the above agreement. From time to time the solicitors rendered statements of account to the execu-

tors, and paid them cheques for balances in their hands, as shewn by such statements, and also rendered detailed bills of their costs in connection with their services; although it is alleged by Mr. Plummer (manager of the corporation) that all their itemized bills of costs were not rendered, but he only refers to two or three small items in this connection. These bills of costs were submitted to Mr. Burk, as under his agreement he was primarily liable for payment of the same; or, rather, it was his estate that was paying the same. The bills were paid, as shewn by the statements so rendered, by the retention of the amount of the same by the solicitors, as authorized by the agreement. Two or three of the larger bills were moderated by the taxing officer upon notice to Mr. Burk, who neglected to attend, but who went over these and the greater number of the bills—all the large ones at least—and objected to certain items in the same; but, upon obtaining the explanation of Mr. Snow in reference to these items, he was apparently satisfied that it would be useless or unwise for him to go to the expense and trouble of taxing the same; and upon this application there are produced two letters from Mr. Burk, the first dated the 15th May, 1899, in which he states: "Mr. Snow has spoken to me about the Wilson estate bills of costs, and that there is motion pending concerning them. I remember talking over the matter in 1895, I think, just after the taxation of some of the bills, and I thought, and so stated at the time, that, as there was so little taxed off, there was no object in having any more of them taxed. I am satisfied that Mr. Snow will do what is right, and that the matter can be more beneficially disposed of by an amicable arrangement between the parties." In the second letter Mr. Burk states that he desired to make it clear in his former letter that he had never made any settlement of any of the bills of costs in this matter, and that he never intimated or in any way expressed that he was satisfied with the other bills which he had never seen.

I may mention that Mr. Burk is a solicitor of this Court, and alive to what were proper costs and what not, and also to his right to have them taxed if he so desired; but he is no party to this application, and I do not wish to decide whether he is or is not a necessary party under the agreement of the 2nd December, 1891; as, under the circumstances of the application, I do not consider his rights are affected, especially in the view I take of the matter.

It is contended by the executors that all the bills of costs covered only one transaction, and therefore, being a continuous service, they have the right to a taxation of all the bills from the beginning of 1892 to the present time. They would certainly have a right to a delivery of bills had none been delivered; but where costs had not only been delivered but paid, and treated as paid by the clients, I think the rule is different: *In re Romer and Haslam*, [1893] 2 Q.B. 286.

It appears that, besides the three bills moderated by the taxing officer after notice to Mr. Burk, the other large bills were duly taxed between party and party and certified by the taxing officer, and these bills were accepted by the solicitors as their costs between solicitor and client, and rendered to the executors. I do not find that there was any agreement between the solicitors and the executors that their costs should be taxed at any time the executors chose to have them taxed; no such agreement is proven. I hold, under the authority of *In re Sutton and Elliott* (1883), 11 Q.B.D. 377, that, although all the bills may not have been signed by the solicitors, yet having been paid more than twelve months, they should not, unless special circumstances are shewn, be referred for taxation. I have already mentioned that the bills of costs were accompanied by statements, cheques, and letters, or by one or other of these, and some one or more of these were signed by the solicitors or by their instructions.

As to special circumstances, none are, in my opinion, shewn. I understand from the correspondence that it is alleged that overcharges have been made; if so, it is proper that the particular overcharges relied on should be plainly indicated by the applicants in order that the solicitor may know what he has to meet. The onus of shewing the existence of overcharges lies upon the clients upon such an application: *In re Chisholm and Logie* (1894), 16 P.R. 162.

In my opinion the executors, if they considered it in the interest of the estate, could have had the bills of costs taxed periodically, but this they did not do, and now, after the firm of solicitors has changed, Mr. Beaty dead and his estate insolvent, Mr. Hamilton left the firm and not a party to the application, it is scarcely fair to compel Mr. Snow, the remaining partner, and two young men who have little or nothing to do with the matter, to bear the trouble and annoyance of a taxation of costs, some of which were incurred over eight years ago. I think that, under the circumstances mentioned by me, the motion must be refused.

I understood that the present solicitors were willing, and offered upon the return of the motion to have all bills rendered within twelve months taxed; if this proposition is accepted, an order may issue for that purpose. I may mention that I have examined the various cases referred to by counsel, and say that *In re Wellborne*, [1900] 1 Ch. 857, does not, in my opinion, apply to the facts in this case.

The applicants appealed from the order of the Master dismissing their application, and the appeal was heard by BOYD, C., in Chambers, on the 29th October, 1900.

J. H. Moss, for the appellants, referred to *In re Romer and Haslam*, [1893] 2 Q.B. 286, 300; *In re Baylis*, [1896] 2 Ch. 107; *In re West, King, and Adams*, [1892]

2 Q.B. 102; *In re Wellborne*, [1900] 1 Ch. 857; *Re Baker* (1889), 13 P.R. 227.

W. E. Middleton, for the solicitors, cited *In re Chisholm and Logie*, 16 P.R. 162; *In re Thompson*, [1894] 1 Q.B. 462; *Hitchcock v. Stretton*, [1892] 2 Ch 343; *Re Pinkerton and Cooke* (1899), 18 P.R. 331; *In re Sutton and Elliott*, 11 Q.B.D. 377.

Judgment was delivered on the 2nd November, 1900.

BOYD, C.—So far as the solicitors are concerned, I think the transactions relating to the several securities assigned by the agreement of 1891 are in their nature separable—that they were actually separated by the different actions and proceedings taken in respect of each, and that accounts and bills of costs relating to each were sent to the clients and applicants from time to time, and actual payment supervened by the retention of moneys collected by the solicitors, and the knowledge of such retention by the clients—sanctioned, as it was, by the terms of the agreement. I do not think this can be regarded as one continuous dealing, so that the right to tax is held in suspense till the collection or exhaustion of all the securities.

Failing this ground, there is no other specifically referred to except an alleged agreement that the right to tax generally should remain open to the client. I am not disposed to disagree with the conclusion arrived at by the Master in Chambers on the matter of fact.

As to the group of bills of costs said not to be actually signed by the solicitors, they were substantially sufficient, and, after being paid out of the funds collected, pursuant to the agreement, and with the knowledge and sanction of the clients, it is not open now to treat them as subject to taxation, after years of delay, and no specific overcharges

being indicated: *In re Sutton and Elliott*, 11 Q.B.D. 377, and *In re Falls* (1891), 29 L.R. Ir. 1, 6.

I think the Master has taken a correct view of the application, and his judgment should be affirmed with costs.

PRITCHARD V. PATTISON.

Evidence — Motion — Security for Costs — Nominal Plaintiff — Insolvency — Affidavit — Notice of Motion.

The decision of ROSE, J., *ante* 180, affirmed on appeal; STREET, J., dissenting.

Held, per BOYD, C., that an application for security for costs on the ground that the plaintiff is insolvent and is only nominally interested in the action, should be based on an affidavit of belief on the defendant's part that such are the facts, and such an affidavit should at least be furnished by the defendant before he attempts to establish the facts by examining the plaintiff.

Semble, that the proper practice in such a case is to have the grounds set forth in the notice of motion, as was done in *Port Rowan and Lake Shore R. W. Co. v. South Norfolk R. W. Co.* (1889), 13 P.R. 327; and if this method were adopted, an affidavit of belief might be dispensed with if it was proposed to establish the facts alleged out of the mouth of the plaintiff.

Held, per FALCONBRIDGE, C.J., that the finding of ROSE, J., that the plaintiff had a substantial interest, should be adopted, and such being the position, the defendant had no right to prove the plaintiff's poverty out of his own mouth on this application.

Per STREET, J., dissenting, that the defendant was entitled to examine the plaintiff for the purpose of shewing that he was a mere nominal plaintiff suing for the benefit of another, as well as for the purpose of shewing his insolvency; and the defendant could not be required to establish each particular proposition involved in his motion, in its logical order, before proceeding with the next.

Leave was given to the defendant to proceed in proper form with his application for security.

[November 5, 1900.—*Divisional Court.*]

AN appeal by the defendant from the decision of ROSE, J., *ante* 180, allowing an appeal from an order of the Master in Chambers requiring the plaintiff to answer certain questions upon his examination as a witness upon a pending motion for security for costs. The facts appear in the former report and in the judgments now given.

The appeal was heard by a Divisional Court composed of BOYD, C., FALCONBRIDGE, C.J., and STREET, J., on the 5th November, 1900.

W. E. Middleton, for the defendant.

Caston, for the plaintiff.

Judgment was delivered at the close of the argument.

BOYD, C.—An insolvent plaintiff who is only nominally interested in the action, and in truth suing for the benefit of another, may be ordered to give security for costs: *Mais v. McNamara* (1850), 5 Ex. 267.

But such an application should be based on an affidavit of belief on the defendant's part that such are the facts: *Gell v. Curzon* (1850), 4 Ex. 813; *Haygarth v. Wilkinson* (1848), 12 Q.B. 851. That is lacking in the present case, for the motion when launched was single, viz., to stay or dismiss the action because the plaintiff was not interested as shareholder. This being displaced by affidavit, leave was obtained by the defendant to amend his motion by asking security for costs, and the application was adjourned for a week to enable material to be prepared in support of that branch. That permission to amend properly implied that the necessary groundwork of the defendant's belief under oath should be furnished before making an attempt to verify the necessary facts by means of oral examination of the adversary. The inquisitorial method should not be encouraged as a means of supporting motions of this kind, in the absence of any guarantee of good faith on the part of the mover.

The line of examination now being pursued as to the private means of the plaintiff was, in my opinion, premature, and he should not at present be required to answer. The appeal is dismissed with costs in the cause to the plaintiff, and the defendant is at liberty to proceed in proper form with the application for security. If he does not elect to do so, the application for security is dismissed with costs.

It is, in my opinion, the proper practice in cases like this to have the grounds set forth in the notice of motion, as was done in *Port Rowan and Lake Shore R. W. Co. v. South Norfolk R. W. Co.* (1889), 13 P.R. 327, and many other cases: see *Delap v. Charlebois* (1892), 15 P.R. 45. Possibly by this method an affidavit of belief might be dispensed with if the verification is purposed to be made out of the mouth of the alleged insolvent. But it is more expedient to have both the grounds of motion set forth and the affidavit filed in support thereof when the motion is launched.

FALCONBRIDGE, C.J.—The president of Preston Lodge and also the secretary thereof swear—the latter more positively than the former—that the lodge has no further interest in the shares assigned to the plaintiff. The form of the transaction is suspicious, the consideration of the assignment being a promissory note (not negotiable) for \$25, payable in nine months, when the lodge could have got a dividend of \$15 cash in hand in a short time, with a vague prospect of a further small dividend in the future. However, my learned brother Rose finds that these examinations shew that the plaintiff is holder in his own right of the shares referred to, and not a trustee for the lodge or any member thereof; and his finding ought, for the purposes of this motion, unless we have a very strong opinion to the contrary, to be adopted.

Such being the position, on what ground can the defendant move for security for costs, and what right has he to prove the plaintiff's poverty out of his own mouth on this application?

"The general rule," as stated succinctly by Bowen, L.J., in *Cowell v. Taylor* (1885), 31 Ch.D. at p. 38, "is that poverty is no bar to a litigant, that, from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of

appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another. There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow."

I think that the order of the learned Judge appealed from is right, and that the appeal ought to be dismissed with costs.

STREET, J.—The history of the defendant's motion is set forth in the judgment of my brother Rose, and it appears that as originally launched it comprised both a motion to stay the proceedings and a motion to dismiss the action, and in the alternative a motion for an order for security for costs. A part of the material to be used, as set forth in the notice of motion, was the examination of the plaintiff *to be taken*. Affidavits were filed on both sides, the plaintiff examined the officers of the subsidiary lodge to shew that he had become assignee of their rights, and an adjournment was had to enable the defendant to examine the plaintiff in support of the motion for security for costs.

Now, in order to entitle himself to such an order, it lay upon the defendant to shew:—

1st. That the plaintiff was a mere nominal plaintiff, suing really for the benefit of some other person by whom he was put forward; and

2nd. That the plaintiff was a person of no means.

And the defendant was entitled to examine the plaintiff in support of both these propositions. I do not understand that any practice exists which entitles a party who is subject to examination for discovery to dictate to

the examining party the order in which he shall marshal the subjects of the examination. It seems to me that it would greatly impede the progress of motions, and unnecessarily add to their growing expense, were we to permit a practice to grow up of requiring the party moving to establish each particular proposition involved in his motion, in its logical order, before permitting him to proceed with the next. And yet that is precisely what the plaintiff is seeking to insist upon in the present case. He says to the defendant: "You have two propositions to establish; you shall not ask me any questions in support of the second of them until you have shewn to the Court that you have established the first." In my opinion, this view of the matter cannot be supported. The defendant is entitled to discovery from the plaintiff upon both propositions, and he may place either of them as his first subject of examination.

In my opinion, the appeal should be allowed with costs here and below, payable forthwith, and the order of the Master in Chambers should be restored.

MACDONALD V. SHEPPARD PUBLISHING CO. ET AL.

Discovery—Defamation—Justification—Immorality—Disclosure of Name of Paramour.

The defendants having in their newspaper charged the plaintiff with immorality, he sued them for libel, and the defendants pleaded that the charge was true. The plaintiff having required particulars, the defendants set forth that he lived at a house of ill-fame; that he lived at a particular place in adultery; that a child was born to the woman with whom he lived; and that he brought to his house and kept with the members of his family a woman who had lived in a house of ill-fame. The plaintiff, being examined for discovery, admitted that he had lived in adultery with a woman who had previously lived in a house of ill-fame, and that she bore a child of which he was not the father, but denied the other allegations of the particulars:—

Held, that the plaintiff was bound to disclose the name of the woman, although such disclosure might injure her.

[November 17, 1900.—*Divisional Court.*]

THIS was an appeal by the plaintiff from an order of FERGUSON, J., in Chambers, dismissing the plaintiff's motion to strike out certain particulars delivered by the defendants, and also dismissing an appeal from an order of the Master in Chambers requiring the plaintiff to attend at his own expense and answer certain questions which he refused to answer on his examination for discovery.

The action was brought against the defendant company and the defendant Edmund E. Sheppard to recover damages for libel. The alleged defamatory matter was published by the defendants in a newspaper called "Saturday Night."

The first publication complained of was on the 23rd December, 1899, at which time the plaintiff was a candidate for the office of mayor of the city of Toronto, and the second was on the 6th January, 1900, when the plaintiff had been elected mayor. The publications charged the plaintiff with immorality, in general terms.

The defendants pleaded justification, and, under an order for particulars, delivered particulars of acts of

sexual immorality alleged to have been committed by the plaintiff. These were the particulars sought to be stricken out.

The plaintiff, being examined for discovery, admitted illicit intercourse with a woman referred to in the particulars, but refused to give her name or other details concerning her. The questions which he refused to answer with regard to this woman were the subject of the orders in question on the appeal.

The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J., and STREET, J., on the 9th November, 1900.

Bradford, for the plaintiff. The particulars should be struck out, as the matters set out in effect put a different sense on the alleged libellous articles than that ascribed to it by the plaintiff, and justify it in that sense. The article charges the plaintiff *to be* of a certain character, the justification is that *he was*: *Wood v. Earl of Durham* (1888), 21 Q.B.D. 501. The particulars allege a number of specific acts of which the plaintiff is alleged to have been guilty between the years 1883 and 1891, and charge nothing between that time and the time of publication. This is not a defence. What took place 18 years ago is no evidence of character now: *Moore v. Mitchell* (1886), 11 O.R. 21; *Turton v. Turton* (1830), 3 Hagg. 338. Evidence of specific offences cannot be given, but general evidence at most: *Scott v. Sampson* (1882), 8 Q.B.D. 491; *Fountain v. West* (1867), 23 Iowa 9. The particulars are construed strictly, and thus construed the plaintiff has answered sufficiently all questions: Odgers, 3rd ed., p. 201.

Riddell, Q.C., for the defendants. We are entitled to full disclosure of all material facts, even though the names of witnesses are thus disclosed: *Humphries v. Taylor* (1888), 39 Ch. D. 693; *Johns v. James* (1879), 13 Ch. D. 370; Phipson on Evidence, p. 89; *Marriott v. Chamberlain*

(1886), 17 Q.B.D. 154. The defendants are bound to set forth specific acts, and the particulars are therefore proper : Odgers, 3rd ed., p. 201. The particulars in any event cannot be struck out : *Stewart v. Rowlands* (1864), 14 C.P. 485.

At the close of the argument the Court dismissed the appeal as to striking out the particulars, and reserved judgment upon the other branch.

Judgment was delivered on the 17th November, 1900.

FALCONBRIDGE, C.J.—The plaintiff, on his examination for discovery, deposed that about eighteen years ago he met a young woman on Church street, near the Metropolitan church, in the city of Toronto, having no former acquaintance with her; that they spoke to each other, and, finding that she was pregnant at the time, he made arrangements for her admission into the Burnside Lying-in Hospital; that she was delivered of a child in the Burnside; and that he and she lived together for some months in illicit intercourse in two different places in the city of Toronto. The plaintiff refused to tell her name, or the name she went by then, or where she is now living, on the ground that she is now a respectable married woman, that what took place was eighteen years ago, and that he thinks she would be socially ostracized if her name were made public.

This series of questions was objected to before the learned Judge and before us on the ground that the name sought to be obtained is immaterial in any event, and because the judgment appealed from in effect orders the plaintiff to give the name of a person whom counsel advises the plaintiff to call as a witness.

There is no evidence that the plaintiff has been so advised by counsel, or that he intends to call the person as a witness. His sole objection to disclosing the name, as set

forth above, is entirely inconsistent with the theory that he has any such intention, and, therefore, this objection, even if it were one which, under any circumstances, ought to prevail, is not tenable.

I have gone carefully through the cases cited on the argument, as well as those mentioned in Holmsted & Langton, pp. 625, 626, also in Bray on Discovery, p. 445 *et seq.*, and I am unable to find authority to support the plaintiff's contention. I am free to confess that I should have been glad to be able, on any sufficient ground, to justify myself in giving effect to the plaintiff's objection to disclose the name of the person in question.

The appeal will be dismissed with costs.

STREET, J.—In my opinion, there is no ground shewn upon which the plaintiff is entitled to refuse to disclose the name of the woman in question. The fact that its disclosure may injure her is not, according to the authorities, any reason for its being withheld, provided the defendants are otherwise entitled to the information. In the present case I think they are entitled to know it.

Having charged the plaintiff with immorality, in general terms, in their paper, the present action for damages for the alleged libel is brought against the defendants, and they have pleaded that the charge is true. The plaintiff having required them to give particulars, they have set forth that the plaintiff lived at a house of ill-fame; that he lived in Sumach street in adultery; that a child was born to the woman with whom he lived; and that he brought to his house and kept with the members of his family a woman who had lived in a house of ill-fame. The plaintiff upon his examination has admitted that he lived in Sumach street in adultery with a woman who had previously lived in a house of ill-fame, and that she bore a child at the Lying-in Hospital, which he says was not his; he denies the truth of the rest of the par-

ticulars to which I have referred, and he states certain circumstances in mitigation of that which he admits. He refuses to disclose the name of the woman with whom he lived in Sumach street, on the ground that she is living a respectable life now, but he also says that he intends to call her as a witness at the trial. The defendants insist that the admissions made by the plaintiff are not complete; they assert that they require the evidence of the woman to contradict the plaintiff in his denial of the other statements in the particulars, and that they do not desire to be bound by the plaintiff's account of the circumstances surrounding the portion of them which he partially admits.

I have been unable to find any authority upon the strength of which we could refuse to order the disclosure asked for; and the appeal must, therefore, be dismissed with costs.

STURGEON FALLS ELECTRIC LIGHT AND POWER CO. v.
TOWN OF STURGEON FALLS.

Costs—Taxation—Affidavits—Irregular Filing.

The costs of affidavits for use on a motion in the Weekly Court filed with the Clerk in Chambers, instead of in the Registrars' office, as required by Rule 102, should nevertheless be taxed, if otherwise taxable, where such affidavits have been before the Court on the motion, and are recited in the order made thereon.

[November 26, 1900.—*Boyd, C.*]

AN appeal by the defendants from a taxation by one of the taxing officers at Toronto of the appellants' costs of a motion for an interim injunction, which was dismissed. The appellants complained that the costs of certain affidavits were disallowed. The facts are stated in the judgment.

The appeal was heard by BOYD, C., in Chambers, on the 26th November, 1900.

H. E. Rose, for the appellants.

A. M. Stewart, for the plaintiffs.

Judgment was delivered on the same day.

BOYD, C.—The fact that some of the affidavits on the injunction motion were filed with the Clerk in Chambers, instead of in the Registrars' office under Rule 102*, does not, in this case, determine the taxability of these affidavits as costs of the motion refused, to which the defendants are entitled. They may have been irregularly filed, but, even if not filed at all, they were brought before the Court and used on the motion and recited in the order as being so used. Therefore, they should be taxed—subject to the usual consideration as to their intrinsic character, whether too many on one point, or superfluous or immaterial, as under Rules 1175 and 1176. The taxing officer has not exercised his discretion as to the character of the affidavits, but has disallowed all not filed under Rule 102, which is, I think, an incorrect method. Remit the bills to be taxed as to these rejected affidavits, having regard to the foregoing ruling. No costs.

*102. All papers relating to proceedings in the Weekly Court at Toronto shall be filed in the Registrars' office.

MURRAY V. WURTELE ET AL.

Revivor—Substituted Plaintiff—Absence of Consent—Liability for Costs—Transfer of Right Pendente Lite—Stay of Proceedings.

It may, in rare cases, such as *Chambers v. Kitchen* (1894), 16 P.R. 219, be "necessary and desirable" under Rule 396 to add or substitute a person as plaintiff, without the consent required by Rule 206 (3), upon the application of the opposite party; but where it becomes necessary to substitute a person as plaintiff without his consent, to prevent injustice, he should not be exposed, without some further action on his part or adoption by him of the position into which he is forced, to any liability for damages or costs.

Under the circumstances of this case, the fact that F. had become *pendente lite* the transferee of the promissory note sued on did not entitle the defendants to an order substituting him as plaintiff and making him liable for the costs of the action.

But the original plaintiff could not be allowed to prosecute the action further, because he had no longer any interest in it, and F. could not be allowed to do so because he had not caused himself to be substituted as a plaintiff, nor obtained leave to proceed in his own name upon the judgment pronounced in favour of the plaintiff, which had not been entered, but from which the defendants sought to appeal; and all further proceedings in the action should, therefore, be stayed, but without costs.

[October 10, 1900.—*The Master in Chambers.*]

[October 23, 1900.—*Ferguson, J.*]

[November 13, 1900.—*Divisional Court.*]

THIS was an application on behalf of one Thomas Fraser for an order setting aside so much of an order of revivor, issued on the 12th September, 1900, as directed that the cause be continued at the suit of the said Thomas Fraser as a party plaintiff thereto. The facts are stated below.

The motion was heard by the Master in Chambers on the 6th October, 1900.

J. H. Moss, for the applicant.

J. E. Jones, for the defendants.

Judgment was delivered on the 10th October, 1900.

THE MASTER IN CHAMBERS.—The plaintiff, J. C. Murray, brought action against the original defendants herein

for the recovery of the amount of a promissory note. This action was on the 10th April, 1899, dismissed by the trial Judge, but on the 29th June, 1900, a Divisional Court reversed such decision and ordered judgment to be entered for the plaintiff against the defendants for the amount claimed by him. Such judgment does not appear to have been entered up yet. It appears that the plaintiff, Murray, made an assignment for the benefit of his creditors on the 9th November, 1899, and Messrs. Gagnon & Caron were duly appointed by the proper Court curators of his estate.

On the 3rd May, 1900, the curators duly sold and transferred the assets of the estate, including the promissory note in question herein, to Thomas Fraser, the applicant herein.

It also appears that the defendant J. W. Wurtele departed this life intestate on the 25th February, 1900, and B. A. C. Wurtele was on the 4th September, 1900, duly appointed administratrix of his estate.

On the 12th September, 1900, upon the application of the said B. A. C. Wurtele, this action was revived or continued at the suit of the said Thomas Fraser as party plaintiff, and the said B. A. C. Wurtele as administratrix of the estate of J. W. Wurtele, deceased, the said B. A. C. Wurtele personally, and J. Wurtele, as parties defendants by order to proceed.

On the 26th September, 1900, the new defendants gave notice of appeal to the Court of Appeal from the judgment of the Divisional Court to the said Thomas Fraser, who thereupon moves to set aside the order of the 12th September, 1900, so far as the same affects him. The Rule under which the defendants issued the order herein is Con. Rule 396.* The case of *Seear v. Lawson* (1880),

* 396. Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of an action and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the

16 Ch.D. 121, decides that the order of revivor making the purchaser party plaintiff in the place of his assignor is a proper order. See also *Chambers v. Kitchen* (1894), 16 P.R. 219, 17 P.R. 3, in our own Courts. The motion will be dismissed with costs to the defendants in any event.

Thomas Fraser appealed from the Master's order, and his appeal was heard by FERGUSON, J., in Chambers, on the 22nd October, 1900, the same counsel appearing.

Judgment was delivered on the following day.

FERGUSON, J.—I think the appeal should be allowed. Rule 206 provides (3) that no person shall be added or substituted as a plaintiff without his own consent in writing thereto to be filed. Fraser not only has not consented, but positively declines to be plaintiff. The case differs from *Chambers v. Kitchen*, 16 P.R. 219, in this, that there is now a plaintiff before the Court (Murray). If Murray were desirous of prosecuting the action, notwithstanding his assignment to Fraser, he could do so, though he would probably be held to be a trustee for Fraser. The defendants say that they desire to appeal from the judgment pronounced against them in favour of Murray. I see nothing to prevent their doing this, making Murray the respondent in the appeal, and should the defendants succeed in such appeal, Fraser could not enforce the judgment. He would simply have no judgment to enforce. It was not at all improper for Fraser to notify the defendants that he had become Murray's

action, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties and such new party may be obtained on præcipe, upon an allegation of such change or transmission of interest or liability or of such person interested having come into existence.

assignee so that there might not be any arrangement voluntarily made between Murray and the defendants.

Appeal allowed with costs.

The defendant B. A. C. Wurtele appealed from the order of FERGUSON, J., and made at the same time a substantive motion, in the alternative, for an order staying this action, and directing that the order herein of a Divisional Court pronounced on the 29th June, 1900, should not be issued until the plaintiff should have given to the defendants security for the costs of the action.

The appeal and motion were heard by a Divisional Court (FALCONBRIDGE, C.J., and STREET, J.) on the 6th November, 1900. The same counsel appeared.

On the 13th November, 1900, the judgment of the Court was delivered by

STREET, J.—The first question is whether in cases where it is “necessary or desirable” that a person should be added as a plaintiff under Rule 396, the Court has power so to add him by præcipe order under that Rule, notwithstanding the express provision in sec. 3 of Rule 206, which provides that “no person shall be added or substituted as a plaintiff . . . without his own consent thereto to be filed.”

I think the cases are extremely rare and exceptional in which it is “necessary or desirable” under Rule 396 to add or substitute a person as plaintiff upon the application of the opposite party; but, having before me the case of *Chambers v. Kitchen*, 16 P.R. 219, I cannot say that such cases do not occasionally occur. Moreover, where, as in that case, it becomes necessary to substitute a person as plaintiff without his consent in order to prevent injustice, he should not be exposed, without some further action on his part or adoption by him of the position into which he is forced, to any liability for damages or costs.

In the present case Fraser became the purchaser of the assets of the insolvent estate of the plaintiff in the action. Amongst these was the promissory note upon which this action was brought. Judgment had been given for the defendants in the previous April, but on the 6th November, 1899, three days before the plaintiff's assignment, a motion had been argued before the Divisional Court to set this judgment aside, and on the 26th June, 1900, it was ordered that the judgment for the defendants should be set aside and judgment entered for the plaintiff, with an option to the defendants to take a new trial on certain terms, which have not been complied with. The formal order to this effect has not actually been issued, but the defendants have taken proceedings in appeal against the order; this appeal has not yet been heard. It is under these circumstances that the defendants have taken out upon *præcipe* an order which makes Fraser liable for all the costs of the action, past and future. He has never interfered in any manner in the litigation, and it would be quite impossible to hold that the mere fact of his having become the transferee of the note sued on entitles the defendants to an order making him liable for the costs of the action which has been brought upon it. If he should desire to be substituted or added as a plaintiff, he can be added upon his own application but not, under the circumstances of this case, upon the application of the defendants.

In my opinion, therefore, the order of my brother Ferguson allowing the appeal from the Master in Chambers and setting aside the *præcipe* order was right, and the appeal from it should be dismissed with costs here and below to be paid by the defendant B. A. C. Wurtele.

The questions arising upon the substantive application for a stay of proceedings by the plaintiff are of a different character. It is undoubtedly against the policy of the law to permit one man to prosecute an action for his own benefit in the name of another who has ceased to have

any interest in the subject-matter of the action; and even after the recovery of judgment an assignee of the judgment is within Rule 864, and must, under ordinary circumstances, obtain leave to proceed in his own name to enforce the judgment before doing so: *East End Benefit Building Society v. Slack* (1891), 60 L.J.Q.B. 359. In the present state of the case, therefore, Murray cannot be allowed to prosecute the action further, because he has no longer any interest in it, and Fraser cannot be allowed to do so because he has not caused himself to be substituted as a party plaintiff nor obtained leave to proceed in his own name upon the judgment given in favour of the original plaintiff, Murray. But Fraser has never attempted to proceed with the action nor interfered in it in any way except to give notice to the defendants that the note, the subject of it, had been assigned to him, and upon his application to set aside the order taken out by the defendants, he filed an affidavit refusing to take part in it. There should, therefore, be an order staying all further proceedings in the action; but, considering the circumstances under which the application was made and its form, the order staying the proceedings will be without costs.

MILLAR ET AL. V. THOMPSON.

Attachment of Debts—Fraud—Issue—Amount in Controversy—County Court—Jurisdiction—Residence of Garnishee—Rules 917, 918, 919—Receiving Order.

Where it was charged by a judgment creditor that a fraudulent arrangement had been made between the judgment debtor and his employers, the garnishees, whereby a third person had been substituted for the debtor as the servant of the garnishees, and money paid to such third person, while the debtor continued to do the work :—

Held, that the judgment creditor was entitled to have an issue directed, to which the third person should be a party, to determine whether there was at the time of the service of the attaching order any debt due or accruing from the garnishees to the debtor; to entitle the creditor to an issue, it was not necessary to bring home a case of fraud to the persons against whom it was charged; it was sufficient to shew unexplained facts and circumstances so unusual as to create a strong suspicion that fraud had been practised.

Held, also, that the Judge of a County Court in which the judgment has been recovered has power, when the amount claimed to be due from the garnishee is so large as not to be within the jurisdiction of a County Court, to make the garnishing summons returnable before himself, even where the garnishee resides in another county.

Semble, that the proper construction of Rules 917, 918, and 919 is, that the Judge of a County Court in which a judgment has been recovered has power, when the amount claimed to be due from a garnishee residing in another county is within the jurisdiction of the County Court or the Division Court, to order the garnishee to attend before the Judge of the County Court or the Clerk of the Division within which he lives.

Held, also, that an order for a receiver should not be made in respect of a fund which may be reached by garnishing process.

[November 17, 1900.—*Divisional Court.*]

AN appeal by the plaintiffs (judgment creditors) from an order of the Judge of the County Court of Perth, dated 15th September, 1900, discharging an attaching order and summons for payment over by the garnishees, the Norwich Junction Cheese and Butter Manufacturing Company, and also an order by which a receiver had been appointed.

The circumstances appear in the judgment.

The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J., and STREET, J., on the 9th November, 1900.

Idington, Q.C., for the appellants.

R. N. Ball, for the judgment debtor, the garnishees, and Albert Thompson, a person alleged to be entitled to the fund garnished.

On the 17th November, 1900, the judgment of the Court was delivered by

STREET, J.—On the 10th July, 1900, the judgment creditors, having a judgment in the County Court of the county of Perth for some \$400, obtained from the Judge of that Court and served upon the garnishees, who reside in the county of Oxford, the usual order attaching in their hands all debts due or accruing due from them to the judgment debtor. On the 14th August, 1900, upon the application of the judgment creditors, it was ordered by the same Judge that the garnishees should attend before him in Chambers at Stratford, on the 18th August, 1900, upon an application for an order that they should pay to the judgment creditors the amount of their judgment, or so much as might be due from them to the judgment debtor.

It appeared from the evidence taken that the judgment debtor had been engaged by the garnishees as their cheese maker, and that his brother Albert had suddenly been substituted for him in the position, but that the judgment debtor had continued to do the work. There was much ground to contend upon the evidence that this was a mere colourable arrangement to prevent the creditors of the judgment debtor from seizing the amount coming to him from the garnishees. A cheque was produced on behalf of the judgment debtor and the garnishees bearing date on 9th July, 1900, the day but one before the service of the garnishee order, made by the garnishees in favour of Albert Thompson for \$250, which was alleged to have been a payment on account of what was accruing due on that day for cheese making, but which did not as a fact

represent the actual balance then due. This cheque was not presented at the bank on which it was drawn until the 17th July, eight days after it was drawn, although the bank was in the same town. The evidence of the judgment debtor and his brother, and of the secretary of the garnishees, was of a most unsatisfactory character, and the circumstances surrounding the alleged payment of the \$250 by the cheque dated 9th July were unusual, and such as to create suspicion and doubt as to whether the truth of the matter had been revealed.

With great respect for the conclusion at which the learned Judge of the County Court arrived, I am of opinion that the judgment creditors were entitled to have an issue directed, to which Albert Thompson, who is made a party to this appeal, should be a party, to determine whether there was at the time of the service of the garnishee order any debt due or accruing from the garnishees to the judgment debtor. The judgment creditors, in order to entitle themselves to such an issue, were not bound to bring home a case of fraud to the parties against whom it was in fact charged. It was sufficient for them to shew unexplained facts and circumstances in the dealings *inter se* of the persons charged with fraud so unusual as to create a strong suspicion that fraud had been practised; and this they appear to have done. When the issue comes to be tried, it may be that all these matters may be explained, or that the judgment creditors' case may not be carried beyond the stage of suspicion; but I think they have proved enough to entitle themselves to a trial of their claims.

The question was discussed at the argument as to the power of the Judge of the County Court under Rule 919 to order the further proceedings to be taken before the Judge of another county, and whether it depended upon the amount of the debt claimed to be due or accruing due from the garnishee. In the present case I think it clear

from the evidence taken that the amount of the debt claimed to be due or accruing due from the garnishees was unliquidated and exceeded \$200 at the time of the service of the garnishee order. The claim of the judgment creditors is that the garnishees really owed the judgment debtor, and not his brother Albert, for making their cheese, and that the cheque for \$250 in favour of Albert was fraudulently ante-dated. If this cheque is not taken into account—and the contention of the judgment creditors is that it should not be—then an unliquidated sum beyond the jurisdiction of the County Court was due or accruing due from the garnishees.

It must be assumed that Rules 917, 918, and 919* are based upon some principle, and the principle common to them all seems to be, that, if the debt claimed to be due from a garnishee is so small as to be recoverable in a Division Court, he is not to be compelled to go beyond the limits of the division in which he lives in order to give evidence of its amount in a contest in which he is a mere stakeholder. Similarly, if the debt claimed from him is within the jurisdiction of the County Court, he is not to be compelled to travel beyond the limits of the county in which he lives for the purpose. In cases where the judgment upon which the garnishee proceedings are founded is in the High Court, and the amount claimed to

* 917.—(1) Where the debt claimed to be due or accruing from a garnishee is of the amount recoverable in a County Court, the order to appear, made under Rule 911, shall be for the garnishee to appear before the Judge of the County Court of the county within which the garnishee resides.

918.—(1) Where the debt claimed to be due or accruing from a garnishee is of the amount recoverable in a Division Court, the order to appear, made under Rule 911, shall be for the garnishee to appear before the Clerk of the Division Court within whose Division the garnishee resides.

919. In County Court cases the power conferred by Rules 917 and 918 may be exercised by the Judge although the garnishee does not reside within his county.

be due from the garnishee is so large as not to be within the jurisdiction of the County Court, there is nothing fixing any particular territorial limits within which the Court or Judge may order the garnishee to attend.

Rules 917 and 918 do not confer a power at all upon the High Court; they, in fact, restrict the power given by Rule 911 of ordering any garnishee to attend at any place, by the provision that in the cases covered by them the garnishee shall not be ordered to attend outside the county in which he resides. What then is meant by Rule 919 when it speaks of "the power conferred by Rules 917 and 918?" Having in view the principle I have stated, I think it can only mean that in County Court cases the County Judge in whose Court the original judgment was recovered shall have power to apply the principle by ordering that a garnishee who resides outside of that county, but whose debt is within the jurisdiction of the County Court or the Division Court, as the case may be, shall attend before the Judge of the County Court or the Clerk of the Division Court where he (the garnishee) resides. The other interpretation proposed for these Rules 917 and 919 would require us to hold them to mean "that in High Court cases, where the debt claimed to be due, etc., from the garnishee is within the jurisdiction of the County Court, and in County Court cases, whether the debt claimed to be due is within or beyond the jurisdiction of the County Court, the order shall be for the garnishee to appear before the Judge of the County Court of the county in which he resides," etc. I have been unable to discover any principle upon which this interpretation could be founded, and I think it should be rejected.

In my opinion, then, the order for the garnishees to appear was properly made for them to appear before the Judge of the County Court of Perth, and not before the Judge of the County Court of Oxford, and the issue should be ordered and settled by and tried before him.

I am further of opinion that the order for the appointment of a receiver was properly discharged, because the debt claimed to be due or accruing due if available at all to the judgment creditor was such a debt as might be garnished.

The appeal is allowed in part and disallowed in part, and there should be no costs of it. The costs of the proceedings below should be reserved by the Court below and dealt with by it at the conclusion of the issue which is directed.

WEEKES *v.* UNDERFEED STOKER CO. OF AMERICA ET AL.

Injunction—Stay of Proceedings—Security for Costs.

An order for security for costs made pursuant to Rule 1199, and issued according to Form 95, has the effect of staying all further proceedings until security is given ; and while such order stands, it is not competent for the plaintiff to proceed with a pending motion for an injunction against the defendant who has obtained the stay, but such motion should be enlarged till the security is perfected.

[December 4, 1900.—*Divisional Court.*]

AN appeal by the defendant Eldred from an order of FALCONBRIDGE, C.J., in Court, in the nature of an *interim* injunction, restraining the defendant company until the 6th December, 1900, from transferring certain shares of stock to the appellant.

Pending the plaintiff's motion for an injunction order, the defendant Eldred issued upon *præcipe* and served an order requiring the plaintiff to give security for costs, and staying proceedings until security should be given. Security had not been given when the injunction order was granted.

The appeal was heard by a Divisional Court composed of BOYD, C., and FERGUSON, J., on the 3rd December, 1900.

W. R. Smyth, for the appellant. There was no power to make the order as long as the stay of proceedings was in force : Rule 204. The order for security has the same effect as an order of the Court : *Bank of Nova Scotia v. Laroche* (1883), 9 P.R. 503. Also, the plaintiff being out of the jurisdiction, there should have been in the injunction order an undertaking by a responsible person in the jurisdiction : *Kerr on Injunctions*, 3rd ed., p. 627 ; *Robinson v. Delap* (1898), 18 P.R. 231.

C. A. Moss, for the plaintiff.

Arthur Holmsted, for the defendant company.

Judgment was delivered on the following day.

BOYD, C.—An order for security for costs pursuant to Rule 1199*, and issued according to Form 95, has the effect of staying all further proceedings till security is given. By Rule 1204†, upon this order proceedings in the action shall be stayed from service of the order till its call is satisfied.

That order standing, it is not competent for the plaintiff to proceed with a pending motion for injunction against the defendant who has obtained the stay, and the present order for *interim* injunction should be vacated with costs in the cause to that defendant. See *Doer v. Rand* (1884), 10 P.R. 165. As in *Whiteley Exerciser Limited v. Gamage* (1898), 79 L.T. 20, the motion for injunction should have been enlarged till the security was perfected.

FERGUSON, J., concurred.

* 1199.—(1) Where it appears, by the writ of summons . . . that the plaintiff resides out of Ontario, the order may be obtained on *præcipe*, after appearance . . .

(2) The order may be according to Form No. 95, and shall require the plaintiff, within four weeks from the service of the order, to give security in \$400 for the defendant's costs of the action, and shall direct that all further proceedings be stayed in the meantime . . .

† 1204. Where security for costs is ordered, proceedings in the action shall be stayed, from the service of the order until the security is given, and if given by bond, until the bond is allowed.

EAST V. O'CONNOR ET AL.

Admissions—Withdrawal—Leave—Motion for Judgment.

After all parties had agreed upon a statement of facts, and the plaintiff had served notice of motion for judgment thereon, he delivered a statement of claim and served on the defendants a notice withdrawing the statement of facts and countermanding the notice of motion. One of the defendants then moved for judgment on the statement of facts, which had not been filed :—

Held, that it was not necessary for the plaintiff to make an independent motion to be relieved from his admissions contained in the statement of facts, which had not been acted upon or brought before the Court; after the filing of the statement of claim and the notice of withdrawal, it was not competent for the plaintiff to get judgment on the statement of facts; and if the sanction of the Court were needed for the course taken by the plaintiff, it might be given upon the defendant's motion.

[December 14, 1900.—*Boyd, C.*]

THIS was an action to restrain certain of the defendants, the license commissioners for the city of Toronto, from transferring a license to the defendant O'Connor.

After appearance and before delivery of the statement of claim the solicitors for the parties agreed upon and signed a statement of facts; and the plaintiff, on the 1st December, 1900, served on the defendants a notice of a motion to be made in Court on the 5th December for judgment in accordance with such statement of facts. The motion was not set down for the 5th December, and the statement of facts was not, in fact, filed, though stated to be in the notice of motion. On the 6th December the plaintiff filed and served a statement of claim, and on the 7th December served on the solicitors for the defendants a notice withdrawing the statement of facts and countermanding the notice of motion.

On the 13th December the defendant O'Connor moved, pursuant to notice, for judgment on the statement of facts. Affidavits were filed by the plaintiff shewing his reasons for withdrawing his statement and motion.

The defendant O'Connor's motion coming before BOYD, C., in the Weekly Court, *W. D. Gwynne*, for the plaintiff, objected that, as the statement of facts had been withdrawn, there was nothing before the Court on which to found a judgment.

L. V. McBrady, for the defendant O'Connor.

J. R. Roaf, for the other defendants.

Urquhart v. Butterfield (1887), 37 Ch. D. 357, 362, 363, 369, 374, *Hamilton v. Staley* (1884), 28 Sol. J. 478, and *Elton v. Larkins* (1832), 5 C. & P. 385, were referred to.

Judgment was delivered on the following day.

BOYD, C.—A special case cannot be amended except by consent, but where it appears, even after the decision upon it, that there has been a mistake of fact, the Court may re-open the matter and direct the action to proceed to trial in the usual way: *In re Taylor's Estate* (1882), 22 Ch. D. 495. Here we are dealing not with a special case, but with what is called a "statement of facts," from which the plaintiff now wishes to recede, because he has good reason to believe that some of the admissions of fact are erroneous.

Where judgment has been pronounced upon admissions made in the pleadings, the party who can shew that he has made an admission by mistake will be relieved by the Court and allowed to amend his defence: *Hollis v. Burton*, [1892] 3 Ch. 126.

In the present case the statement of facts is not in the possession of the Court; it has not been filed, and no judicial action has been taken upon it, and it does not appear to me that it is needful to make an independent motion to be relieved from it. The plaintiff gave notice that he receded from this statement, and filed his statement of claim, indicating that the action was to proceed

in the usual way; after that it does not appear to me competent for the defendant to get judgment upon the statement discarded by the plaintiff.

The language of Mr. Justice Pearson in *Harvey v. Croydon Union Rural Sanitary Authority* (1884), 26 Ch. D. at p. 252, is pertinent to this point: "When a case is settled by the parties without the intervention of the Court, it is, in my opinion, competent for either party before the order has been drawn up to say they would like to have the opinion of the Court."

In *Elton v. Larkins*, 5 C. & P. 385, the written admissions had been used upon a former trial, and so were subject to the discretion of the Court.

I think it was competent for the plaintiff to recede from his admissions before they were in any way acted upon or brought before the Court, and that the sanction of the Court (if needed) may be given on the motion of the other party, seeking to act upon the withdrawn admissions.

Here the affidavits filed shew that the plaintiff was acting on good and reasonable grounds in desiring a trial as to the facts. And affidavits in answer ought not to be used to shut out the plaintiff from proceeding according to the usual methods to issue and trial.

No order on the defendant's motion, except that the plaintiff pay as costs in the cause in any event to the defendants the extra costs occasioned by his abandoned motion and the preparation of the abandoned statement of facts.

RE THOMPSON—THOMPSON V. THOMPSON.

Money in Court—Payment Out—Life-Tenant—Lunatic—Foreign Guardian—Maintenance.

During the infancy of the defendant \$2,000 was paid into Court, to one-half of which she was entitled on attaining majority, and to the other half after the death of her mother. The defendant having come of age, but being of unsound mind, and residing abroad with her mother, who had been appointed her guardian by a foreign Court, the mother applied for payment out of the whole fund, having given in the foreign Court specific security for the amount:—

Held, as to the half of the fund in which the applicant had a life interest, that it might be paid out to proper trustees appointed to administer and safeguard it, or it might be paid out to the applicant upon substantial security being given.

Held, as to the other half, that, being actually in the hands of the Court, it was subject to the jurisdiction of the Court, and should be applied for the support and maintenance of the person of unsound mind, in the discretion of the Court—whatever sum should be shewn to be necessary for maintenance being paid to the foreign guardian.

[December 17, 1900.—*Boyd*, C.]

MOTION by Lillian Walton for payment out of Court to her (as guardian of the person and effects of the defendant Mabel Thompson) of the sum of \$2,000, under the circumstances set forth in the judgment.

The motion was heard by BOYD, C., in Chambers, on the 10th December, 1900.

J. D. Montgomery, for the applicant.

J. Hoskin, Q.C., official guardian, for Mabel Thompson.

Judgment was delivered on the 17th December, 1900.

BOYD, C.—The sum of \$2,000 is now in Court, paid in during the infancy of the defendant Mabel Thompson; to one-half of which she is entitled absolutely on attaining majority, and to the other half after the death of one Lillian Walton (formerly Thompson). Mabel Thompson is now of age, and has become of unsound mind, having been treated as thus incompetent by a Michigan Court, in which

State she now resides with her mother. The mother, who has made a second marriage, applies for the payment out to her of the whole \$2,000, as being guardian of the person and effects of Mabel under order of the Probate Court of Wayne county, dated the 27th November, 1900. Security appears to be given in \$2,500 by the personal bond of the married woman and one D. H. Huyck. The actual value of this security is not made to appear, though it is alleged to be specific security for the amount of these moneys in the Accountant's hands.

Hanrahan v. Hanrahan (1890), 19 O.R. 396, is cited as warranting the order.

I do not doubt the power to pay out so that there should be a sufficient discharge legally for the money, so far as the Court is concerned. But in a case like this, with resident guardian, the money would not be paid out *en bloc*, but would be held and dealt with by the Court in the best interests of the incompetent. Should it be different when the guardian and beneficiary are out of the jurisdiction?

The equitable view and the practice of the Court are sufficiently set forth in *Re J. T. Smith's Trusts* (1889), 18 O.R. 327, *Re Humphries* (1899), 18 P.R. 289, *Re Harrison* (1899), *ib.* 303, and *Whitewood v. Whitewood* (1900), 19 P.R. 183, so far as infants are concerned.

Upon the present application I must take it that the incapacity of non-age has been accompanied or succeeded by the incapacity of mental unsoundness.

As to one-half coming to infant now of age, she is not able to receive that and discharge the Court; as to the other half, as entitled in remainder, she could ask the Court to retain the money to be forthcoming on the death of the life-tenant. In the latter case the modern method is to pay out the fund, if proper trustees are appointed to administer and safe-guard it, as in *Re Braithwaite* (1882), 21 Ch. D. 121. But the life-tenant is not a proper trustee

for such a purpose. Yet it may be paid out to the life-tenant on proper security being given. That imports substantial and tangible security to the satisfaction of the Master in the case of those not *sui juris*: see *In re Parry* (1889), 42 Ch. D. 570, 582, and cases cited.

No sufficient case is made for the payment out of the \$1,000 in which the applicant is life-tenant.

As to the other \$1,000, it is the money of the incompetent, and should be applied for her support and maintenance. This fund, being in Court for the infant, remains in Court for the benefit of the adult of unsound mind, and is, because of its actually being in the hands of the Court, subject to its jurisdiction. In those circumstances an order may be made for the maintenance of the imbecile out of the fund, in whole or in part according to circumstances: *Re Burke* (1860), 2 DeG. F. & J. 124, and *Re Tayler* (1861), *ib.* 125. On the present materials I do not see that the applicant is entitled as of right to the fund; on the contrary, the matter rests in the discretion of the Court, as expounded in *Re Garnier* (1872), L.R. 13 Eq. 532, *Re Knight*, [1898] 1 Ch. 257, and *Re Hill*, [1900] 1 I.R. at p. 352. This much may be now said, that whatever is required for maintenance, as established by evidence to the satisfaction of the Court, should be transmitted to the foreign guardian. But no such case is made on the present application.

I make, therefore, no order.

LAIRD V. KING.

Writ of Summons—Renewal—Service—Rule 132.

The time allowed for renewal of a writ of summons is, upon the proper construction of Rule 132, to be reckoned *inclusive* of the date of issue or of a former renewal.

Black v. Green (1854), 15 C.B. 262, 3 C.L.R. 38, and *Anon.* (1863), 11 W.R. 293, 32 L.J.N.S. Ex. 88, 7 L.T.N.S. 718, followed.

Where the original writ of summons was issued on the 5th November, 1898, and was renewed on the 4th November, 1899, the renewal ran out on the 3rd November, 1900, and service thereafter was of no effect.

[December 3, 1900.—*The Master in Chambers.*]

[December 11, 1900.—*Boyd, C.*]

AN application by the defendant for an order setting aside the service of the writ of summons herein and also the order renewing the writ. The facts appear in the judgment.

The motion was heard by the Master in Chambers on the 30th November, 1900.

H. L. Drayton, for the defendant.

Caston, for the plaintiff.

Judgment was delivered on the 3rd December, 1900.

THE MASTER IN CHAMBERS.—The action is brought for the purpose of setting aside a tax deed, and the writ of summons was issued on the 5th November, 1898. This writ was not served during the twelve months from its date, and the plaintiff applied on the 4th November, 1899, for an order renewing the same, and an order was made renewing the writ for twelve months from that date, and pursuant thereto the writ was renewed. In obtaining such order for renewal the plaintiff's solicitor made an affidavit in which he stated :

“ 3. The plaintiff desires to prosecute the action and to that end have the writ renewed. 4. That it is the

desire of the plaintiff to adjust the matters in question without urging on the action, and I am informed and believe he is likely to do so."

The renewed writ was not served until the 5th November, 1900.

The evidence produced shews that the plaintiff could have readily served the defendant with the writ of summons almost at any time during the past two years, but that no attempt whatever was made to serve the same, nor were there any negotiations commenced by the plaintiff with the defendant or any one representing him with reference to the matters in question in this action. In fact, the plaintiff did nothing whatever after issuing the writ and registering a *lis pendens* against the lands until he renewed the same on the 4th November, 1899, and then after that nothing further was done until near the time of its expiry, when an *ex parte* application for a second renewal was made on insufficient material, and the order was refused; the plaintiff, notwithstanding that, gave the sheriff the renewed writ for service. The sheriff received it on the 5th November and served it the same day.

I must hold, under the authorities and Rule 132, that this renewed writ expired on the 3rd November, 1900, and that the service after that date was irregular. The plaintiff does not shew any merits on this motion to entitle him to have the writ renewed and service allowed. I must, therefore, set aside the service and discharge the certificate of *lis pendens* with costs.

The plaintiff appealed, and his appeal was heard by BOYD, C., in Chambers, on the 10th December, 1900.

The same counsel appeared.

Judgment was delivered on the following day.

BOYD, C.—A writ of summons is in force for twelve months from the date thereof, including the day of such

date ; but the writ may at any time before its expiration be renewed for twelve months, and so from time to time during the currency of the renewed writ. This language of Rule 132 is borrowed in substance from sec. 11 of the English Common Law Procedure Act of 1852, and it was for a good while in doubt as to whether upon the renewal of a writ the day of such renewal should be reckoned *inclusive*. That was finally settled by the Court of Exchequer in 1863, for reasons stated in *Black v. Green*, by Jervis, C.J., and Maule, J., in favour of the time allowed for renewal being inclusive of the date of renewal : *Anon.* (1863), 11 W.R. 293, 32 L.J.N.S. Ex. 88, 7 L.T.N.S. 718. Turning to *Black v. Green* (1854), 15 C.B. 262, and better reported by Mr. Finlason as *Anon.*, in 3 C.L.R. 38, these reasons are, in brief, that it is to be inferred that the two periods should be computed in the same way—that the second or renewed writ should not exist a day longer than the first, and that the whole Rule was overridden by the first provision in the section, so as to make the date of issue or of renewal inclusive. We find this construction embodied in the present Rule of the English practice as to renewal of writs (Order 8), which expressly declares that the renewal shall be from the date of the renewal inclusive. It would have been better, perhaps, to have thus expressed it in our Rule 132, but this is, I think, the proper effect and reading of the text as it stands.

The Master was right, therefore, in holding that the original writ of summons issued on the 5th November, 1898, ran out on the 4th November, 1899, and that the renewal of that date ran out on the 3rd November, 1900. Service was too late on Monday the 5th November, and no good reason appears to be assigned for validating it.

Affirm with costs.

REID V. WALTERS.

*Discovery—Examination of Party—Appointment—Service—Enlargement—
Default of Attendance—Rules 443, 446.*

The plaintiff obtained from the proper officer an appointment for the examination for discovery of the defendant; the defendant's solicitor was served with a copy of the appointment more than forty-eight hours before the time appointed for the examination, but the defendant himself was not served. At the appointed time and place the plaintiff's solicitor attended before the officer, but neither the defendant nor his solicitor attended, and the officer enlarged the appointment till the next day (the 7th), and on the 7th, the defendant still not having been served, and neither he or his solicitor attending, the officer enlarged the appointment till the 8th. On the 7th the defendant was served with the appointment for the 8th and with a subpoena, and was paid his conduct money, and his solicitor was on the 7th notified by letter of the enlargement till the 8th:—

Held, that the defendant was in default for not attending for examination on the 8th.

Rules 443 and 446 construed.

[November 23, 1900.—*The Master in Chambers.*]

[December 3, 1900.—*Meredith, C.J.*]

[December 10, 1900.—*Divisional Court.*]

MOTION by the plaintiff for an order striking out the defence on the ground that the defendant refused to attend for examination for discovery pursuant to an appointment, or for an order directing him to attend at his own expense for such examination. The facts are stated in the judgments.

The motion was heard by the Master in Chambers on the 22nd November, 1900.

W. N. Ferguson, for the plaintiff.

Ludwig, for the defendant.

Judgment was delivered on the following day.

THE MASTER IN CHAMBERS.—It appears that the plaintiff issued an appointment for the examination of the defendant for discovery on the 3rd November, 1900, returnable before the special examiner of this Court at

Whitby on the 6th November, 1900. The defendant's solicitors were properly served with this appointment at least forty-eight hours before its return. On the 6th November, at the hour and place appointed, the agent of the plaintiff's solicitors attended before the special examiner, and, in consequence of the defendant not having been served with the appointment, he enlarged the examination until the following morning and had a new appointment for service on the defendant signed by the examiner and made returnable at the time to which the appointment served upon his solicitors had been enlarged. The following morning the agent of the plaintiff's solicitors again attended the examiner, and, no one attending for the defendant, he had the examination further enlarged until the 8th November, and issued another appointment to serve upon the defendant personally. This new appointment was served upon the defendant personally within a reasonable time before the hour appointed for the examination, and the plaintiff's solicitors took the precaution to notify the defendant's solicitors of the fact, and also that the appointment served upon them for the examination had been duly enlarged to the 8th November.

On the 8th November the plaintiff's solicitor attended before the special examiner at the hour mentioned for the purpose of proceeding with the examination, but neither the defendant nor his solicitor attended, and this application was thereupon launched.

Counsel for the defendant contends that the appointment served upon the defendant's solicitors for the 6th November lapsed by reason of the defendant not having been served with it, and that no appointment for the 8th November was served upon the defendant's solicitors, although an appointment was served upon the defendant personally for the 8th; the contention being that the special examiner had no right to enlarge the examination, the defendant not having been served; and further, that Rules 443 and

446, under which the examination takes place, provide that the appointment to be issued by the examiner is the one to be served on both the solicitor and the client, and that it is improper to issue two appointments, as was done in the present case.

I think that this interpretation is rather technical and should not be upheld. I consider that the special examiner becomes seized of the matter when he issues the appointment to examine under Rule 443, and has power to enlarge its return at the request of either party; that appointment, however, must be served upon the solicitor of the defendant at least forty-eight hours before its return, and upon this being shewn the examiner may enlarge the time of the examination to suit the parties. The appointment to be served upon the defendant need only be served a reasonable time prior to the date appointed for the examination; and if the solicitor has had sufficient notice under the appointment served upon him, and the time for such examination has been regularly enlarged, it will only be necessary to serve the defendant with an appointment for the time to which the original appointment was enlarged. This was done in the present case, and I am of opinion that the defendant should have attended for examination on the 8th November, and, not having done so, that he is in default.

The order will issue directing that the defendant do attend and submit to be examined before the special examiner at Whitby, at his own expense, and that he do pay to the plaintiff the costs of and incidental to this application in any event of the cause.

The defendant appealed, and his appeal was heard by MEREDITH, C.J., in Chambers, on the 30th November, 1900.

The same counsel appeared.

Judgment was delivered on the 3rd December, 1900.

MEREDITH, C.J.—This is an appeal by the defendant from an order of the Master in Chambers directing him to attend before the local registrar at Whitby, at his own expense, and submit himself for examination for discovery, and to pay the costs of the application for the order in any event of the cause.

On the 3rd November, 1900, an appointment was obtained by the respondent's solicitors from the local registrar at Whitby for the examination of the appellant, returnable on the 6th day of the same month, at 1.30 p.m.; a copy of the appointment was served on the appellant's solicitor more than forty-eight hours before the time at which the appointment was returnable, but the appellant was not served with a copy of the appointment or with a subpœna before the return day. On the return day, at 1.30 p.m., the solicitor for the respondent attended the local registrar with proof of the due service of the appointment on the appellant's solicitor, but neither the appellant nor his solicitor attended. Upon its being stated to the local registrar that, as the fact was, the appellant had not been served, that officer enlarged his appointment until the following day, at 10.30 a.m.; a new appointment was not obtained, but the date of the return of the one already issued was changed to the new day and hour appointed. On the 7th November, at the hour appointed, the solicitor for the respondent attended the local registrar, but neither the appellant nor his solicitor did so; and upon the application of the respondent's solicitor and his statement that, as the fact was, the appellant had not yet been served, the local registrar further enlarged his appointment until the 8th November, at 10.30 a.m. The appellant having been served with a copy of this last appointment and with a subpœna *duces tecum* on the 7th November and paid his conduct money, the respondent's solicitor again attended at the hour fixed for the examination on the 8th November, but again neither the appellant nor his

solicitor attended, whereupon the respondent's solicitor proved the service of the appointment and subpoena on the appellant and the payment of the conduct money, and waited half an hour after the time named in the appointment. The respondent's solicitor, by letter of the 7th November, notified the appellant's solicitor of the enlargement which had been made on that day.

The motion to the Master in Chambers was for an order striking out the defence of the appellant, on the ground that he had refused to attend for examination for discovery pursuant to the appointment of the local registrar, or for his attendance at his own expense at Toronto for examination.

The sole point in question on the appeal is as to whether the appellant was in default in not attending for examination.

It was contended on his behalf that, inasmuch as he had not been served with the first appointment and with the subpoena before the time at which the appointment was returnable, the appointment became spent, and that the local registrar had no jurisdiction to make the enlargements which he granted, and it was said that in effect the appellant had been held bound to attend upon an appointment of which forty-eight hours' notice had not been given to his solicitors.

The Rules applicable are Consolidated Rules 443 and 446, and I think that not only is the procedure according to the interpretation which was placed upon these Rules by the Master in Chambers a convenient and reasonable one, but also that that interpretation was correct.

But for the provisions of Con. Rule 443, requiring service of the appointment and a subpoena upon the party to be examined and the payment of his conduct money, it would have been the duty of the party to attend and submit to examination on forty-eight hours' notice of the appointment being given to his solicitor, and probably

because in some cases less than forty-eight hours' notice would be sufficient to the party himself, and in others longer notice would be necessary, and it was not thought reasonable to require him to attend unless his conduct money should have been paid, this provision was inserted, and no provision was made as to the length of notice to be given to the party, leaving that to be governed by what, in the circumstances of each case, might be held to be reasonable notice.

I do not see why it was not competent for the officer, on proof of proper service on the solicitor for the appellant of notice of his appointment, though the solicitor did not appear before him, to enlarge the appointment, just as without doubt he might have done in the case of any other appointment.

There is nothing in the Rules, as I read them, to differ in this respect the case of such an appointment as the one in question here from any other appointment. It is true that Rule 443 requires a copy of the appointment to be served on the party to be examined, but that requirement of the Rule was complied with in this case by the service of the appointment for the day and hour to which the original appointment had been enlarged.

The Rules relating to the cross-examination of persons who have made affidavits, and Rule 485, which deals with examinations of witnesses, make applicable to such proceedings the Rules as to the examination of a party for discovery, and it would scarcely be contended that, where an appointment for such an examination is obtained and duly served on the solicitor of the opposite party, the examiner would not have power to enlarge it, though the solicitor did not attend, if and because the person to be examined had not been subpœnaed in time to enable his examination to take place then, and if that could be done, I do not see why a different practice should prevail when the examination is one for discovery under Rule 443.

The order appealed from should, in my opinion, be affirmed and the appeal dismissed, with costs to be paid by the appellant to the respondent in any event of the cause.

The defendant again appealed and his appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J., and STREET, J., on the 10th December, 1900.

The same counsel appeared.

THE COURT, at the conclusion of the argument, dismissed the appeal with costs, agreeing with the reason given by the Master and the Chief Justice in Chambers.

MOLSONS BANK V. SAWYER ET AL.

Security for Costs—"Plaintiff"—*Claim by Defendants against Co-defendant*—*Rules 215, 1198.*

Where a defendant proceeds under Rule 215 to seek relief from a co-defendant which he would not be entitled to upon the pleadings and proofs between the plaintiff and defendants, he is a "plaintiff" within the meaning of Rule 1198, and, if resident out of the jurisdiction, is liable to an order for security for costs.

Walmsley v. Griffith (1885), 11 P.R. 139, considered.

[October 30, 1900—*The Master in Chambers.*]

[November 8, 1900—*Falconbridge, C.J.*]

[December 21, 1900—*Divisional Court.*]

APPLICATION by the defendants Samuel and Benjamin for an order for security for costs against their co-defendants, Sawyer & Company. The facts are stated in the judgments.

The application was heard by the Master in Chambers on the 30th October, 1900.

Tilley, for the applicant.

Waldron, for the defendants Sawyer & Company.

Judgment was delivered on the same day.

THE MASTER IN CHAMBERS—The defendants Sawyer & Company are residents out of the jurisdiction, having no means within this Province with which to satisfy the costs of their co-defendants, should they be awarded any. The defendants Sawyer & Company have asked relief against their co-defendants, and the latter now ask that the former be required to give them security for their costs.

I think that I am bound by the decision of the late Master in Chambers in *Walmsley v. Griffith* (1885), 11 P.R. 139, which held that there could not be such security ordered for a defendant as against his co-defendant, citing *In re Percy and Kelly Nickel, &c., Co.* (1876), 2 Ch. D. 531, and *Furness v. Booth* (1876), 4 Ch. D. 586, and which further held that the defendant there had a right to ask relief against his co-defendant, and cited *Campbell v. Robinson* (1880), 27 Gr. 634. Feeling bound by this decision, I must refuse the application with costs to the defendants Sawyer & Company in any event.

The defendants Samuel and Benjamin appealed from the Master's decision, and their appeal was heard by FALCONBRIDGE, C.J., in Chambers, on the 2nd November, 1900.

The same counsel appeared.

Judgment was delivered on the 8th November, 1900.

FALCONBRIDGE, C.J.—The rule laid down by the late learned Master in Chambers in *Walmsley v. Griffith*, 11 P.R. 139, has been acquiesced in for fifteen years—a very long time, considering the activity of solicitors in matters of practice.

I do not see that there is any change in the Rules which would affect the principle of that decision.

The appeal will be dismissed with costs to the defendants Sawyer & Company in any event.

The defendants Samuel and Benjamin appealed from the decision of the Chief Justice, and their appeal was heard by a Divisional Court composed of MEREDITH, C.J., and ROSE, J., on the 12th November, 1900.

The same counsel appeared.

Judgment was delivered on the 21st December, 1900.

ROSE, J.—The action is on a promissory note made by the defendants Sawyer & Company to the order of and indorsed by M. & L. Samuel, Benjamin, & Company, of which firm the defendants Samuel and Benjamin were members.

A statement of defence was put in by the defendants Samuel and Benjamin only. The defendants Sawyer & Company, however, served upon their co-defendants Samuel and Benjamin notice under Rule 215, claiming “to be indemnified” by them “against liability under the note sued on in this action by the plaintiffs and against any judgment . . . in respect of the same and against the costs of this action, on the ground that the said notes were given as accommodation and on the written agreement of the said M. & L. Samuel, Benjamin, & Company to retire the same at maturity, dated the 11th day of April, 1898, wherein you have failed.”

Upon that notice being served, an order was made for the trial of the question of liability, giving Samuel and Benjamin liberty to deliver a statement of defence, directing that the notice, statement of defence, and any reply should constitute the pleadings or record of the issues between the defendants Sawyer & Company and the third parties, Samuel and Benjamin, and containing other provisions perhaps not necessary to be considered.

Upon this state of facts, Samuel and Benjamin applied for an order for security for costs, under Rule 1198.

It was admitted that if Sawyer & Company were plaintiffs within the meaning of Rule 1198, the facts entitled the defendants Samuel and Benjamin to an order. It was contended, however, that no order for security could be had between co-defendants on the authority of *Walmsley v. Griffith*, 11 P.R. 139, a decision of the late Mr. Dalton, Master in Chambers, and the cases therein referred to. That was a motion on behalf of the defendant Webster for security for costs from the defendant Hall, who had filed what was called a counterclaim against the defendant Webster. The Master in Chambers said: "There cannot be such security ordered for a defendant as against his co-defendant."

On the authority of *Walmsley v. Griffith*, the Master in Chambers refused the order, saying that he thought he was bound by that decision. On appeal from this order to the Chief Justice of the Queen's Bench, it was affirmed, principally on the ground that the decision in *Walmsley v. Griffith* had remained apparently unquestioned since November, 1885, and that it would be unwise to disturb the practice.

Thereupon an appeal was taken to this Court.

I propose to consider the Rule apart from the decision, because the language of the Rule has been changed since the decision referred to, and then to consider whether there is any decision which prevents the ordinary construction being placed upon the language of the Rules.

Rule 1198 provides that: "(1) Security for costs may be ordered where by law or by the practice a party has heretofore been entitled to obtain security for costs, and, without restricting the generality of this provision, also in the following cases: (a) Where the plaintiff resides out of Ontario."

Section 2, sub.-sec. 5, of the Judicature Act, R.S.O. 1897 ch. 51, declares that “‘Plaintiff’ shall include every person asking any relief (otherwise than by way of counterclaim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.”

The Rule prior to 1198 was Rule 1498, which repealed Rule 1243. Rule 1243, as also Rule 1498, provided: “In addition to any cases in which a *defendant* in any action may by any law,” etc. In the present Rule the word “defendant” is dropped, and the word “party” is substituted, the phraseology being otherwise, but not materially, different.

It was suggested that this amendment was made probably to get rid of the difficulty of considering whether the party claiming the order for security was strictly a defendant. “Defendant” is interpreted by sub.-sec. 7 of sec. 2 of the Judicature Act as follows:—“‘Defendant’ shall include every person served with any writ of summons or process, or served with notice of or entitled to attend any proceeding.”

By Rule 215 it is provided that: “Where a defendant claims to be entitled to contribution or indemnity from or relief over against any other defendant, a notice may be issued and the same procedure shall be adopted as if such last mentioned defendant were a third party”

It seems to me clear, looking at the language of the Rule, that a defendant claiming indemnity from a co-defendant and taking advantage of the third party procedure, becomes as to such proceedings an actor, and is a plaintiff within the meaning of the Interpretation Act.

Cotton, L.J., in *Eden v. Weardale Iron and Coal Co.* (1887), 35 Ch. D. at p. 295, said: “The words of definition of ‘plaintiff’ and ‘defendant’ in the 100th section of the Judicature Act are so wide as to include all persons who litigate one against the other in any proceeding any question which the Court may properly decide.”

Lindley, L.J., said (p. 296): "Being defendants not because they are third parties, but by reason of the order of the 17th of March, 1885, they are entitled to leave to deliver interrogatories."

Assuming that, under the Rules to which I have referred, the fact of serving the third party notice upon a co-defendant does not by itself make such defendant a defendant in that proceeding, we have here an order similar to the order referred to by Lindley, L.J.

In either view, the parties to this motion stand in the relation to each other of plaintiffs and defendants.

But it is said that the cases upon which the Master in Chambers relied, and others cited to us, are authorities to the contrary, and that if this appeal be allowed it will overrule the decision in *Walmsley v. Griffith*.

I see nothing in the cases to which reference has been made, and to which I shall refer, opposed to the view that I have taken, except what seems to me the too wide statement made in *Walmsley v. Griffith*.

The cases cited in *Walmsley v. Griffith* were: *In re Percy and Kelly Nickel, &c., Co.*, 2 Ch. D. 531; *Furness v. Booth*, 4 Ch. D. 586; *Campbell v. Robinson*, 27 Gr. 634. In the latter case all that was decided was: "Where a case is made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a Court of equity is entitled to make a decree between the defendants." This language is that of Lord Eldon in *Chamley v. Lord Dunstony* (1807), 2 Sch. & Lef. at p. 718. That learned Judge also said: "Further, my Lords, a Court of equity is bound to do so. The defendant chargeable has a right to insist that he shall not be liable to be made a defendant in another suit for the same matter, that may be then decided between him and his co-defendant. And the co-defendant may insist that he shall not be obliged to institute another suit, for a matter that may be then

adjusted between the defendants. And if a Court of equity refused so to decree, it would be a good cause of appeal by either defendant."

In such a case as the one before us, it is manifest that Sawyer & Company's case would not be made out against their co-defendants by evidence arising from pleadings and proofs between plaintiffs and defendants, for it is not set up by the defendants or any one of them in answer to the plaintiff's claim that the note in question was an accommodation note, and that Samuel and Benjamin were really the ones to pay it. Nor is the determination of the question whether the note was an accommodation note, or whether Sawyer & Company had an agreement from Samuel and Benjamin to indemnify them, at all necessary in order to the relief sought by the plaintiff. See opinion of MacLennan, J.A., in *Walker v. Dickson* (1892), 20 A.R. at p. 104. Indeed, it is clear on the pleadings that for the determination of the issues raised as between the plaintiff and Samuel and Benjamin it is quite immaterial whether the note was or was not an accommodation note, and, although a statement to that effect might appear on the evidence, the fact might rest in doubt and be left undecided.

So that if this case had come down for trial under the old practice, the claim by Sawyer & Company against Samuel and Benjamin was not one which, according to the rule laid down by Lord Eldon, would have entitled Sawyer & Company to a decree against the defendants.

In re Percy and Kelly Nickel, &c., Co., 2 Ch. D. 531, decided that "a shareholder of a company who resides out of the jurisdiction and appears to oppose a petition for winding up the company cannot be required to give security for costs."

The following language from Jessel, M.R., states the point in the case, i.e.: "A defendant who is brought before the Court has a right to take any proceeding to *defend* himself without being called on to give security for costs."

Furness v. Booth, 4 Ch. D. 586, determines that by virtue of the Imperial Judicature Act, 1873, sec. 24, subsec. 3, and Order XVI., Rule 17, "questions between co-defendants may be raised by a pleading which states both a defence as against the plaintiff and a claim against a co-defendant, but such a pleading is not a counterclaim under Order XXII., Rule 5, and should not be so intitled."

The case of *Re Miller's Patent* (1894), 70 L.T.N.S. 270, reviews the authorities and is a decision in favour of the appellants. Kekewich, J., said: "The principle upon which the Court has acted in ordering security for costs in the cases cited of *Vavasseur v. Krupp* (1878), 9 Ch. D. 357, and *Apollinaris Company v. Wilson* (1886), 31 Ch. D. 632, is perfectly clear and perfectly simple. It is this: That no person out of the jurisdiction is allowed under ordinary circumstances to institute proceedings in the High Court here without reasonably satisfying the respondent to his application—*be he defendant or be he in any other way respondent*—that, supposing the application fails, there will be a tangible opportunity of recovering the costs of failure."

In *Neck v. Taylor*, [1893] 1 Q.B. 560, Lord Esher, M.R., laid down the rule as to a counterclaim as follows:—"Where the counterclaim is put forward in respect of a matter wholly distinct from the claim, and the person putting it forward is a foreigner resident out of the jurisdiction, the case may be tried as if that person were a plaintiff, and only a plaintiff, and an order for security for costs may be made accordingly, in the absence of anything to the contrary. Where, however, the counterclaim is not in respect of a wholly distinct matter, but arises in respect of the same matter or transaction upon which the claim is founded, the Court will not, merely because the party counterclaiming is resident out of the jurisdiction, order security for costs; it will in that case consider whether the counterclaim is not in substance put

forward as a defence to the claim, whatever form in point of strict law and of pleading it may take, and if so, what under all the circumstances will be just and fair as between the parties; and will act accordingly."

The principle of that decision, as it seems to me, supports the application here.

Sub-section 5 of sec. 2 of the Judicature Act, in interpreting the word "plaintiff," excludes a defendant asking relief by way of counterclaim.

This, of course, is not a counterclaim; and the exception seems to me to give strength to the argument that but for such exception a defendant seeking relief by counterclaim would be as to such counterclaim a plaintiff.

Sample v. McLaughlin (1897), 17 P.R. 490, was cited, but that proceeded upon the principle that the parties against whom security was sought were in the position of defendants.

I see no reason for not giving to the Rule what seems to me to be the plain meaning of the words, and I am of the opinion that where a defendant proceeds under Rule 215 to seek relief from a co-defendant which he would not be entitled to upon the pleadings and proofs between the plaintiffs and defendants, he is beyond question a plaintiff within the meaning of Rule 1198, and, if resident out of the jurisdiction, he is liable to an order for security for costs.

In the view I have taken of the case, it is not necessary to determine in this case whether, where the claim for relief is one which would be supported by the pleadings and proofs as between the plaintiffs and defendants, it is necessary to rely upon the provisions of Rule 215, and whether in such a case the Court would be empowered to make a decree as between defendants, and I desire to confine my opinion to the facts of this case, but having regard to Rules 2 and 3 and the statement of the learned Chancellor in *Flett v. Way* (1891), 14 P.R. at p. 315,

that Rule 3 supersedes all former practice (see also cases cited in *Holmsted & Langton* in note to the Rule), it will be well for a defendant claiming relief to take advantage of the provisions of Rule 215.

Possibly a defendant still may require the Court to give judgment over against himself where it has not been specifically claimed by his co-defendant, as Lord Eldon said he might do under the old practice.

I think the appeal must be allowed and the order granted. The costs here and below to be to the defendants Samuel and Benjamin in any event.

MEREDITH, C.J.—I have had an opportunity of reading the judgment which my brother Rose has written, and I concur in the conclusion to which he has come and the view which he has expressed as to the practice which obtained before the change in what is now Con. Rule 1198, which was effected at the last consolidation of the Rules, by the addition of the words:—"Where the plaintiff resides out of Ontario:" sec. 1, clause (a).

This addition, taken in connection with the interpretation which, according to the provision of sec. 2 (5) of the Judicature Act, is to be given to the word "plaintiff" in that Act and in the Rules, appears to me to have made a substantial change in the practice as to ordering security for costs to be given by a person who is a defendant to an action which existed before the amendment was made.

That provision is as follows:—

"(5) 'Plaintiff' shall include every person asking any relief (otherwise than by way of counterclaim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise."

The provision contained in the amendment to Rule 1198 to which I have referred is not to be found in the English Judicature Act and Rules, and in reading and

considering the English cases since the Act came into force this difference must be borne in mind, and, though the claim of the appellants may be given effect to on another ground, I should be prepared to hold that, whatever might have been the practice before the change in our Rule, the effect of the change is to bring the respondents in respect of their claim against their co-defendants within the Rule, they being as to it plaintiffs who reside out of Ontario.

I have only a word to add as to the case of *Walmsley v. Griffith*, 11 P.R. 139, relied on by the respondents and referred to in the judgment of my learned brother. There are doubtless to be found in the somewhat meagre report of that case observations attributed to the Master in Chambers which seem to support the contention of the respondent, but, if read as they ought to be in the light of the facts of the case Mr. Dalton was considering, those observations do not necessarily go that far.

The pleadings in the case, which I have examined, shew that the plaintiff was a derivative mortgagee seeking to foreclose the equity of redemption of his immediate mortgagor, and that also of the primary mortgagor. The defendant Hall, against whom an order for security for costs was applied for, had been added as a defendant in the action upon the allegation by him that he and not the primary mortgagor was entitled to the equity of redemption in the primary mortgage, and that the primary mortgagee was his agent and had taken the mortgage in his own name in fraud of the defendant Hall, and the plaintiff had amended his statement of claim by stating this claim of Hall. The case was, therefore, one clearly of the same class as *Campbell v. Robinson*, and within the Rule stated by Lord Eldon which my learned brother quotes. Hall was a necessary party to the action to enable the plaintiff to obtain the relief which he was seeking, and the case between Hall and his co-defendant, against whom he sought relief, must therefore necessarily have been made

out by evidence arising from the pleadings and proofs between the plaintiff and the defendants, and the case was, therefore, one where, according to the practice in equity, a Court of equity had a right and was bound to make a decree between the defendants.

RODGER V. THE NOXON COMPANY.

Pleading—Statement of Claim—Amendment—Conformity with Writ—Rule 300—Incorporated Company—Slander—Joinder of Causes of Action—Trial.

The writ of summons claimed damages against an incorporated company for wrongful dismissal and slander. The original statement of claim was confined to the former cause of action, but, after defence and before reply due, the plaintiff amended on *præcipe* by adding a claim for slander :—

Held, that it was competent for the plaintiff to do so, under Rule 300.

Semble, that an incorporated company may be liable if slander is spoken by its servants or agents in direct obedience to its orders; and

Held, that, at all events, the pleading setting up slander should not be struck out summarily, but should be adjudicated on.

Leave to the defendants to have the question of law first determined.

The two causes of action were properly joined; but application might be made under Rule 237 to direct the method of trial.

[October 6, 1900.—*Boyd, C.*]

THIS was an appeal by the plaintiff from an order of the local Judge at Woodstock striking out paragraph 7 of the amended statement of claim.

The plaintiff had by his writ of summons claimed damages for wrongful dismissal and slander. In his original statement of claim the only cause of action set up was wrongful dismissal. After delivery of defence, but before his reply was due, the plaintiff, on *præcipe*, amended his statement of claim by adding the 7th paragraph, wherein he set up a cause of action for slander. The defendants thereupon moved before the local Judge to strike out this amendment on the following grounds: that an action for slander does not lie against a corporation; that only a

formal or clerical amendment should be made under Rule 300; and that the two alleged causes of action could not be properly joined. This last ground was not pressed on the appeal.

The appeal was heard by BOYD, C., in Chambers, on the 5th October, 1900.

F. A. Anglin, for the plaintiff.

T. Wells, for the defendants.

Judgment was delivered on the following day.

BOYD, C.—An incorporated company may be liable to an action of defamation if it expressly authorizes a libel to be published by its servants or agents: *Whitfield v. South Eastern R. W. Co.* (1858), E. B. & E. 115, and *Carroll v. Penberthy Injector Co.* (1889), 16 A.R. 446. And so, one would think, it may be liable if oral slander is spoken by its servants or agents in direct obedience to its orders. The difficulty would rest rather in the proof than in the pleading: see Odgers, 3rd ed., p. 435, and Fraser p. 69. At all events, the matter is not so clear that I should undertake to strike out summarily a pleading imputing slander to the corporation; rather let it be adjudicated on after being put on the record.

As to Rule 300,* I think too limited an effect was given to it by the local Judge. The plaintiff's claim on the writ was for wrongful dismissal and slander. But the statement of claim omitted any reference to the alleged slander. This was remedied by amendment after the delivery of the defence, and it was competent to do so. See, also, Rules 244 and 120 and 137 and Form 7, sec. IV., Part 2, Appendix. The amended statement of claim conforms to the twofold nature of the plaintiff's claim as indorsed on the writ of summons. For this reason, *Moore v. Alwill* (1881), 8 L.R. Ir. 245, is not in point, for there

*300. The plaintiff may, without leave, amend his statement of claim once before the expiration of the time limited for reply and before replying. . . .

the plaintiff sought to add a new cause of action not mentioned in the indorsement of the first process.

Let the pleading be restored; costs in cause.

The defendants may have leave to plead as advised, and to have first determined the question of law arising on this claim for slander.

It was not objected that these causes of action might not be joined, nor could it be under Rule 232; but application may be made under Rule 237 to direct the method of trial if that should appear expedient or convenient after issue is reached.

TORONTO PUBLIC LIBRARY BOARD V. CITY OF TORONTO.

Mandamus—Municipal Corporations—Statutory Duty—Prerogative Writ—Summary Application—Action—Affidavits, Intituling of.

When a public body is required to perform a statutory duty at the instance of one entitled to call for such performance, the practice in England is to move summarily for the prerogative writ of mandamus, according to the prescribed procedure in the Crown office.

But in this Province all the Divisions have co-ordinate jurisdiction; and the practice in cases of the prerogative writ is assimilated to that in ordinary applications of a summary nature: see Rules 1084, 1090, 1091, 1092.

And where a meritorious application was made, in an action, for a mandamus to compel a city corporation to levy a special rate for library purposes under the Public Libraries Act, R.S.O. 1897 ch. 232, it was directed that the affidavits should be re-sworn and intituled as in an application (not in an action) for the prerogative writ.

[December 13, 1900—*Boyd, C.*]

THE PLAINTIFFS, a body politic and corporate duly constituted under the provisions of R.S.O. 1897 ch. 232, brought this action against the corporation of the city of Toronto, which had a population of 100,000 or over, for a declaration that the plaintiffs were entitled to have levied and assessed for the year 1900 a special rate sufficient to furnish \$31,233, being the amount estimated by them to be required for the expenses for carrying into effect the provisions of R.S.O. ch. 232, and to recover pay-

ment of \$31,233 from the defendants, and for a mandatory order directing the defendants to levy and assess the said rate for the year 1900 and pay the proceeds thereof to the plaintiffs. The action was begun on the 27th September, 1900, and issue was joined on the 20th October, 1900.

On the 30th November, 1900, the plaintiffs served notice of a motion, in the action, for an order of mandamus commanding the defendants, under the provisions of R.S.O. ch. 232, to levy and assess a special rate for the year 1900 sufficient to furnish \$31,233, less \$29,144, which latter sum had been levied and assessed since action brought.

The motion was heard on the 10th December, 1900, by BOYD, C., in Chambers.

Du Vernet, for the plaintiffs.

Fullerton, Q. C., for the defendants.

Judgment was delivered on the 13th December, 1900.

BOYD, C.—Motion, in an action, for a mandamus to compel the city to levy a special rate for library purposes for the year 1900, under the provisions of the Public Libraries Act, R.S.O. ch. 232. A detailed estimate prepared by the library board was duly submitted to the city council, calling for \$31,233, which up to the extent of \$29,144 has been satisfied by the defendants, but the litigation is in respect of the balance, amounting to \$2,089.

The only substantial answer made to the demand is, that certain members of the plaintiffs, forming a deputation to wait upon the city in order to urge the necessity of having the balance promptly forthcoming, did upon that occasion agree to waive and dispense with the collection of this balance. The weight of evidence is entirely against this conclusion, and, besides, the deputation had no authority to dispense with the collection of any part of the amount estimated by the board.

It was not disputed that it was competent to move in a summary way, in the action, for the writ of mandamus, though it was argued that the discretion of the Court should be exercised against the application. But, being a public matter resting upon a statutory obligation, I think the Court should simply act in furtherance of the plaintiffs' demand, which appears to be well founded. It is matter of less cost to move as in Chambers; and the alleged expense of a special levy will not be diminished if postponed till the case can be heard next year.

It was suggested that the plaintiffs are not entitled to the writ, because it is not proved that the amount claimed did not exceed one-half of a mill in the dollar upon the assessed value of all ratable real and personal property, as required by sec. 14 (1) of the Act. I would allow an affidavit now to be filed, in terms proving this, if any doubt as to the fact exists, but it is nowhere hinted in the pleadings, nor in the correspondence or affidavits, that the amount is in such excess; on the contrary, it is assumed throughout all negotiations and letter writing that the amount was within the statutory limit.

No objection was made that an action did not lie for this relief. The rule in England is, no doubt, that, when a public body is required to perform a statutory duty at the instance of one entitled to call for such performance, the proper method is to move summarily for the prerogative writ of mandamus, according to the prescribed procedure in the Crown office: *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, 122; *Smith v. Chorley District Council*, [1897] 1 Q.B. 532, 538; *Re Paris Skating Rink Co.* (1877), 6 Ch. D. 731. But in this Province all the Divisions have co-ordinate jurisdiction: *Re Board of Education of Napanee and Town of Napanee* (1881), 29 Gr. 395; and the practice in cases of the prerogative writ is assimilated to that in ordinary applications of a summary nature. See Rules 1084, 1090, 1091, and 1092. In my opinion, the affidavits should be re-sworn and further

intituled as they would be in an application (not in an action) for the prerogative writ. The case cited of *Widnes Alkali Co. v. Sheffield and Midland R. W. Co.'s Committee* (1887), 37 L. T. 131, has no application here, for in that case the nature of the claim was properly the subject of an action, which is not the case here.

The parties have fought out the matter as fully as can be on the facts, and the interests of all will be promoted by not giving effect to a technical point, with the result of a repetition of these proceedings in slightly altered form of caption.

If the parties are content to let this order for the issue of a peremptory writ end the contest, I think the plaintiffs should have costs of this motion, and should be allowed to dismiss the action without costs.

Of course the writ to levy need not be put into operation if the money can be raised by the city in any other way, and I would suspend its operation for a reasonable time with that end in view.

LIDDELL ET AL. V. COPP-CLARK CO. ET AL.

Pleading—Copyright in Book—Registration—Infringement—Particulars.

In an action for infringement of copyright in a book, the statement of claim alleged that the plaintiffs were the proprietors of a subsisting copyright duly registered, and further alleged that the defendants printed for sale a large number of copies of another book, a part whereof was an infringement of the plaintiffs' copyright:—

Held, that the defendants were entitled to particulars shewing the date of registration of the plaintiffs' copyright, and shewing what part of the defendants' book infringed the plaintiffs' right.

Sweet v. Maugham (1840), 11 Sim. 51, not followed.

Mawman v. Tegg (1826), 2 Russ. 385, 390, and *Page v. Wisden* (1869), 20 L.T.N.S. 435, followed.

[December 26, 1900.—*The Master in Chambers.*]

MOTION by the defendants for particulars under the statement of claim, heard by the Master in Chambers, on the 17th December, 1900.

J. B. Holden, for the defendant company.

C. A. Moss, for the other defendants.

John Greer, for the plaintiffs.

Judgment was delivered on the 26th December, 1900.

THE MASTER IN CHAMBERS.—An action for infringement of the plaintiffs' copyright in a book entitled "A School History of Rome," etc.

In their statement of claim the plaintiffs allege in the 2nd paragraph that they are the proprietors of a subsisting copyright, duly registered, without mentioning the date of registration, and in the 3rd paragraph they state that the defendants printed for sale a large number of copies of a book entitled "High School History of Greece and Rome," a part whereof entitled "History of Rome" is an infringement of the plaintiffs' copyright.

The defendants demanded particulars of the date of registration, and also in what respects the part entitled "History of Rome" is an infringement of the plaintiffs' alleged copyright. This demand not being complied with, the defendants now apply for an order for the particulars demanded. Counsel for the plaintiffs oppose the application on the ground that they are not bound by the practice to give the same: *Sweet v. Maugham* (1840), 11 Sim. 51. That was a case where a bill was filed and an injunction moved for, and the Vice-Chancellor said: "As long as I remember the Court, it never has been thought necessary for a party who complains that his copyright has been infringed, to specify, either in his bill or his affidavit, the parts of the defendant's work which he thinks have been pirated from his work; but it has been always considered sufficient to allege, generally, that the defendant's work contains several passages which have been pirated from the plaintiff's work; and to verify the rival works by affidavit. Then, when the injunction has been moved for,

the two works have been brought into Court, and the counsel have pointed out to the Court the passages which they rely upon as shewing the piracy."

But the practice in equity seems to have been different from that followed at law.

In the 2nd ed. of the American and English Encyclopædia of Pleading and Practice, under "Copyright," it is stated: "NECESSARY ALLEGATIONS—IN GENERAL.—In a suit for infringement, the bill, declaration, or complaint must contain allegations sufficient to shew title in the complainant and to clearly define the infringement for which redress is sought:" and several cases are referred to, such as *Cary v. Kearsley* (1803), 4 Esp. 168, 6 R.R. 846; *Mawman v. Tegg* (1826), 2 Russ. 385, 390; and others. This last reference would indicate that the practice followed in the later authority of *Sweet v. Maugham* was only applicable to cases in equity, but that where an action at law was brought the plaintiff was required, one month before the defendant was required to plead, to deliver to the defendant a statement of such part or parts of the books claimed to be copies of, or colourably altered only from, the plaintiff's books: see the order made in that suit at p. 403.

I would also refer to the remarks of Vice-Chancellor Malins in delivering judgment in *Page v. Wisden* (1869), 20 L.T.N.S. 435.

In my opinion, the defendants are entitled to such a statement or such particulars as were ordered in *Mawman v. Tegg*. This will not only save expense and limit the issue as mentioned by Vice-Chancellor Malins in *Page v. Wisden*, but will prevent surprise at the trial.

I scarcely think that it was seriously argued by the plaintiffs' counsel that the date of the registration need not be given. All the cases on that point are clear that it must be given.

An order for particulars will be granted; costs in the cause.

McIVER ET AL. V. CROWN POINT MINING CO. ET AL.

Mechanics' Liens—Writ of Summons—Service out of Jurisdiction—Statement of Claim—Time for Delivering Defence—Trial—Appointment in Writing—Notice of Trial.

An order permitting service out of the jurisdiction of the writ of summons should also authorize service of the statement of claim at the same time and fix a time for delivery of the statement of defence.

Young v. Brassey (1875), 1 Ch.D. 277, followed.

Where the order makes no provision as to the statement of claim or defence, the defendant should have eight days from the last day for appearance within which to deliver his statement of defence, and the pleadings cannot be noted closed before the expiry of such eight days. Under sec. 35 (1) of the Mechanics' Lien Act, R.S.O. 1897 ch. 153, the Judge or officer fixing a day for the trial of an action brought under that Act, is to do so in writing; and a notice of trial under that section given by a party who has not obtained a signed appointment from the Judge or officer, is not effective. The notice of trial must be served at least eight clear days before the day fixed, as provided by sec. 36.

[December 31, 1900.—*The Master in Chambers.*]

APPLICATION on behalf of the defendant Barton for an order setting aside the writ of summons, statement of claim, the noting of the pleadings, and notice of trial, on the ground of irregularity. The action was to enforce a mechanics' lien.

The application was heard by the Master in Chambers on the 28th December, 1900.

Levesconte, for the defendant Barton.

W. N. Ferguson, for the plaintiffs.

Judgment was delivered on the 31st December, 1900.

THE MASTER IN CHAMBERS.—The first irregularity appears in that the plaintiffs served a statement of claim on the defendant outside of the jurisdiction of this Court without first obtaining an order permitting such service.

The contention of the plaintiffs' counsel is that no order for such permission is necessary: that Rule 166, which reads as follows: "Where a defendant is to be served

out of Ontario, with a writ of summons or notice in lieu thereof, the statement of claim shall be served therewith unless the writ is specially indorsed under Rules 138, 139 or 141:" requires the statement of claim to be served with the writ: and that when an order is made giving leave to serve a writ out of the jurisdiction, the statement of claim is included in such leave. I do not agree with this contention. Our practice in Ontario has been to permit service of the statement of claim as well as of the writ of summons, and to provide for the defence being delivered within a certain time limited. This practice, I think, is the one pointed out as the proper one to be followed by Hall, V.-C., in *Young v. Brassey* (1875), 1 Ch.D. 277.

In the present case the writ was served on the defendant in Montreal on the 1st November, 1900, and at the same time a copy of the statement of claim was served. By the order giving leave to serve the writ, the time for appearance was limited to twenty days after service. Both writ and statement of claim appear to have been sent to his solicitor by the defendant Barton with instructions to defend the action. An appearance was duly entered with the proper officer on or about the 20th November, 1900, and, as no time was given for delivering a statement of defence in the order for service of the writ of summons under Rule 246, the defendant would have eight days from the time limited for appearance in which to deliver his defence. This would bring the time for delivering a defence to the 28th November, 1900, but it appears that the pleadings were noted closed on or before the 27th November (evidence of the date of noting pleadings must be given before order issues). I assume that they were closed on or before the 27th November, for on that day the plaintiffs gave notice of applying to the Judge to fix the day of trial.

Notice of trial was served on the defendant's solicitor on the 10th December for the 18th December, 1900. This

notice does not appear to have been signed by the Judge, as required by R.S.O. 1897 ch. 153, sec. 35 : * see the judgment of Mr. Justice Street as to the necessity of its being signed in *Pilkington v. Browne*.†

Section 36 of the same statute requires that at least eight clear days' notice of trial must be given. This time was not given, so that the notice of trial must be set aside, and, as the noting of the pleadings was premature, it must also be set aside. The defendant Barton to be at liberty to file a statement of defence within eight days. I make no order as to setting aside statement of claim. Costs to the defendant Barton in any event.

* The Mechanics' and Wage-Earners' Lien Act, sec. 35—(1) After the delivery of the statement of defence where the plaintiff's claim is disputed, or after the time for delivery of defence in all other cases, where it is desired to try the action other than at the ordinary sittings of the High Court, either party may apply to a Judge or other officer who has the power to try the action, to fix a day for the trial thereof, and the said Judge, or other officer, shall give an appointment fixing the day and place of trial. . . .

† *Pilkington v. Browne*. STREET, J., in Chambers, 28th March, 1898.—A motion by the plaintiff to set aside a notice of trial served by the defendant Browne and the counterclaim of the defendant Browne. The action was to enforce a mechanic's lien. The counterclaim was for damages for alleged breach of the contract for the supply of materials in respect of which the lien was registered. The action was discontinued. An order was obtained by the defendant Browne, *ex parte*, from Mr. Neil McLean, an official referee, appointing a time and place for special trial of the counterclaim (under sec. 35) before the Master in Ordinary. Notice of trial pursuant thereto was given.

STREET, J., held :

1. That there should have been notice of the application to fix a day for trial.
2. That no judicial officer can give an appointment for trial before another officer.
3. That the counterclaim was proper under the Act.

The notice of trial and appointment were set aside. The motion to set aside the counterclaim was dismissed. No costs.

A DIGEST

OF THE

CASES REPORTED IN THIS VOLUME.

ABSCONDING DEBTOR.

See ARREST.

ABSENTEE.

See PARTITION.

ACCOUNT.

See DISCOVERY, 2—MORTGAGE.

ACTION.

1. *Settlement of Action — Setting Aside—Counsel—Solicitor — Costs.*]—Where counsel, acting upon the instructions of the plaintiff's solicitor, effected a compromise of the action not authorized by the plaintiff and contrary to the express instructions given by her to the solicitor, the compromise was set aside and the plaintiff allowed to proceed to trial, but, as the plaintiff and defendant were innocent parties, without costs to either against the other.

Stokes v. Latham (1888), 4 Times L.R. 305, followed. *Jane Benner v. Edmonds*, 9.

2. *Limitation of Actions—Judgment—Revivor—Time—Notice.*]—In 1894 the plaintiff obtained *ex parte* (the defendant being out of the jurisdiction) an order reviving a judgment for the payment of money which he had recovered against the defendant in 1875, and allowing the entry of a suggestion on the judgment roll, and the issue of execution. The plaintiff entered the suggestion in 1894, and afterwards examined the defendant as a judgment debtor, whereupon the defendant made an offer of settlement, which was not accepted. The plaintiff died in 1895 and the defendant in 1899, after which the personal representative of the plaintiff obtained an order on *præcipe* reviving the action in his name as plaintiff and in that of the personal representative of the defendant as defendant:—

Held, that the last order should have been made on notice, but it was proper to treat an application to set it aside as a substantive motion on notice, and, so treating it, the order should be confirmed.

The order made in 1894 re-viving the judgment should have been made on notice, but, under the circumstances of the defendant's absence from the country, his subsequent examination, and the attempted settlement, it was a valid and binding order.

Held, also, following *Mason v. Johnston* (1893), 20 A.R. 412, that the judgment remained in force for twenty years, and the entry of the suggestion within that time was effectual to renew the time from which the statute begins to run. *Allison v. Breen*, 119. Affirmed, see No. 3.

3. *Limitation of Actions—Judgment—Revivor—Time—Notice—Ex Parte Order—Application to Set Aside.*]—Decisions of STREET, J., and the Master in Chambers, *ante* 2, refusing to set aside order re-viving judgment, affirmed on appeal.

Boice v. O'Loane (1878), 3 A.R. 167, as to the lifetime of a judgment, followed in preference to English decisions.

The practice of dealing with the question raised on an application to set aside an *ex parte* order as if the application were a substantive one for such order, approved. *Allison v. Breen*, 143.

See COSTS, 4, 11—MANDAMUS—STAY OF PROCEEDINGS.

ADMINISTRATION.

See COSTS, ETC., 9.

ADMISSIONS.

Withdrawal—Leave—Motion for Judgment.]—After all parties had agreed upon a statement of facts, and the plaintiff had served notice of motion for judgment thereon, he delivered a statement of claim and served on the defendants a notice withdrawing the statement of facts and countermanding the notice of motion. One of the defendants then moved for judgment on the statement of facts, which had not been filed:—

Held, that it was not necessary for the plaintiff to make an independent motion to be relieved from his admissions contained in the statement of facts, which had not been acted upon or brought before the Court; after the filing of the statement of claim and the notice of withdrawal, it was not competent for the defendant to get judgment on the statement of facts; and if the sanction of the Court were needed for the course taken by the plaintiff, it might be given upon the defendant's motion. *East v. O'Connor*, 301.

See JUDGMENT, 6.

AFFIDAVITS.

See COSTS, 17—EVIDENCE, 3, 5—MANDAMUS—PAYMENT INTO COURT.

ALIMONY.

Costs—Interim Order—Disbursements—Undertaking.]—Notwithstanding the language of Rule 1144—“only the amount of the cash disbursements actually and properly made by the plaintiff’s solicitor”—an order may be made in an action for alimony for payment by the defendant to the plaintiff’s solicitor of a sum to cover prospective witness fees, upon the undertaking of the solicitor to account for all sums not actually and properly disbursed. *Stevenson v. Stevenson*, 48.

AMENDMENT.

See EVIDENCE, 4—PLEADING, 1.

APPEAL.

1. *Court of Appeal—Stay of Proceedings—Removal of—Security for Costs—Rules 826, 827—Costs of Unsuccessful Motion.*]—Upon an appeal to the Court of Appeal, upon security for costs being allowed, in general the proceedings ought to be stayed; but if it is made to appear in any case that the respondent may suffer injustice by his execution being stayed, then the stay may be removed, upon terms which may be just to both parties: Rules 826, 827.

The plaintiff recovered a money judgment against the

defendants, a benevolent society incorporated in a foreign country, but having members in Ontario who paid dues and assessments which were transmitted abroad. The defendants appealed from the judgment to the Court of Appeal, and gave security for costs. Upon an application by the plaintiff under Rule 827 to remove the stay of proceedings it was admitted by the defendants that they had no assets in Ontario, but they said that they were advised that they had good grounds for the appeal, and if it should fail, that the plaintiff’s claim would be paid; and this was not contradicted:—

Held, that the dues and assessments of members in Ontario, being voluntary payments, could not be reached by a receiver or by attachment; and there was no prejudice or injustice that the plaintiff was likely to suffer by the stay, as he already had security for costs, and the delay would be compensated by interest on the judgment, if the appeal should be unsuccessful.

Boyd v. Dominion Cold Storage Co. (1897), 17 P.R. 545, distinguished.

Held, also, that the costs of the unsuccessful motion should be paid by the applicant; there is no rule that costs of such a motion shall go to the successful party upon the appeal. *Wintemute v. Brotherhood of Railway Trainmen*, 6.

2. *Master’s Report—Time—*

Cross-Appeal—Rule 769.]—According to the true meaning of Rule 769, each party is precluded from appealing against the report or certificate of a Master unless he serves his notice of appeal within the fourteen days mentioned in the Rule; and notice of appeal given in proper time by one party does not prevent the report from becoming absolute as regards another party. *Stewart v. Ferguson*, 21.

3. *Abandonment—Reinstatement—Grounds for Leave to Appeal—Judgment—Error—Injustice.*]—The defendants, after setting down an appeal for hearing by a Divisional Court, served notice abandoning it, and the case was struck out of the list. They afterwards moved to have it restored to the list:—

Held, that if the motion could be treated as one for leave to appeal notwithstanding the lapse of time, it would be incumbent upon the applicants to shew that *prima facie* the judgment below was wrong; and there being no error apparent on the face of the judgment, and no specific error having been pointed out, such an application must be refused.

But, *semble*, the motion could not be so treated.

The judgment below found that the defendants were trespassers and directed a reference as to damages. When the appeal was abandoned the

defendants thought the claim of the plaintiffs would be much smaller than it subsequently appeared to be; and on learning the size of the claim, the defendants wished to renew their appeal:—

Held, no ground for interfering. *Union Bank of Canada v. Rideau Lumber Co.*, 106.

4. *Supreme Court of Canada—Security for Costs—Stay of Proceedings—Payment of Money Out of Court.*]—The plaintiffs recovered judgment in the High Court against the defendants for damages and costs. The defendants appealed to the Court of Appeal, paying \$200 into Court as security to the plaintiffs for the costs of such appeal, which was dismissed with costs. The defendants launched a further appeal to the Supreme Court of Canada, and gave the security required by sec. 46 of the Supreme and Exchequer Courts Act, but no other security:—

Held, that proceedings to enforce the plaintiffs' judgment in the High Court were not stayed, either by force of sec. 48 or otherwise.

But the Court was not bound to pay out immediately to the plaintiffs the sum of \$200 paid in by the defendants, the judgment of the Court of Appeal being stayed pending the appeal to the Supreme Court, which might determine that the plaintiffs were not entitled to the

costs of the Court of Appeal; and the money ought not to be paid to the plaintiffs, from whom it could never be recovered, and whose solicitors declined to take it upon the usual undertaking, but should remain in Court pending the appeal. *Rombough v. Balch*, 123.

5. *Leave to Appeal—Order Setting aside Judgment—Grounds of—Plausible Attack—Statement of Claim—Service by Posting—Irregularity—Delay—Discretion.*]—A Divisional Court of the High Court having set aside a judgment signed by the plaintiffs for default of defence in an action on a bond (19 P.R. 145), upon two grounds, viz., (1) that a motion for judgment was necessary, and (2) that the statement of claim had never been legally served upon the defendants, the posting up thereof in the office not being service because of the omission to file an affidavit of service of the writ of summons before doing so:—

Held, that leave to appeal should not be granted unless the plaintiffs could make a plausible attack upon both grounds, for if only one were demolished, the other would support the judgment, and leave to appeal will not be given merely to settle a point of practice the decision of which would not affect the judgment complained of.

And in this case the service of the statement of claim could

not be supported, having regard to Rule 574, and it was in the discretion of the Court below to give effect to the objection to its regularity, notwithstanding the defendants' delay in moving against the judgment. *Appleby v. Turner*, 175.

6. *Leave to Appeal—Judicature Act, sec 77.*]—Where a motion to quash a municipal by-law was refused by the Judge who heard it, and his order affirmed by a Divisional Court, an application for leave for a further appeal was dismissed:—

Held, that under sec. 77 (4) (e) of the Judicature Act, upon such an application for leave, it must appear that there is some reasonable ground for doubting the soundness of the judgment, and in addition thereto that special reasons exist for taking a case out of the general rule which forbids more than one appeal to the same party. *Re Reddock and City of Toronto*, 247.

7. *Leave to Appeal.*]—See PARTIES, 2.

See COSTS, ETC., 10, 11, 12, 14, 19.—EVIDENCE, 4.—INTERPLEADER, 2.

APPEARANCE.

See PARTIES, 2.

ARREST.

1. *R.S.O. ch. 80, sec. 1—Intent to Quit Ontario—Intent to Defraud Creditors.*—It is not sufficient for a creditor applying for an order for arrest under R.S.O. ch. 80, s. 1, to shew the existence of a debt and that the debtor is about to quit Ontario; he must shew some other fact or circumstance which, coupled with those facts, points to an intent to defraud.

Shaw v. McKenzie (1881), 6 S.C.R. 181, *Tooth v. Frederick* (1891), 14 P.R. 287, and the opinions of BURTON and MACLENNAN, J.J.A., in *Coffey v. Scane* (1895), 22 A.R. 269, followed.

The opinions of HAGARTY, C.J.O., and OSLER, J.A., in *Coffey v. Scane*, and of the latter in *Robertson v. Coulton* (1881), 9 P.R. 16, dissented from.

McVeain v. Ridler (1897), 17 P.R. 353, discussed.

Whether or not there is good and probable cause for believing that the intent to defraud exists, is a question of fact.

And where the defendant believed that his wife had no claim against him for alimony:—

Held, that he could not be intending to defraud her by leaving Ontario. *Phair v. Phair*, 67.

2. *Application for Discharge—Onus—Intent to Defraud—Former Absconding.*—Upon an application by the defendant for his discharge from arrest

under a *ca. re.*, he did not dispute the existence of the debt alleged by the plaintiff, nor that he was about to leave the country without paying or providing for it, but contended that he was not about to quit the Province with intent to defraud.

The debt sued for was contracted in 1893, and arose out of an irrigation scheme, in which the plaintiff was induced by the defendant to purchase an interest. It was alleged, but disputed, that this was a fraudulent scheme. It was also alleged and denied that the defendant in 1893 absconded from this Province to the United States of America. The defendant was a citizen of the United States, and was in Ontario in 1893, and again in 1900, when arrested, for temporary business purposes. It was not shewn that he ever had any property in this Province, nor that he took any away with him in 1893, nor that at the time of his arrest he had any in his hands or under his control. The evidence did not shew that he was at the time of the arrest about to leave the Province hurriedly, but that he intended to stay till he had finished the business which brought him to the Province, and then to return to his own country as of course:—

Held, FERGUSON, J., dissenting, that the Court could not, upon this application, try the question whether the defendant

did or did not abscond in 1893; that the onus was upon the plaintiff to make out the fraudulent intent in the departure now proposed, by more than mere suspicion; and that, upon all the facts and merits disclosed, the arrest could not be maintained.

Kersterman v. McLellan (1883), 10 P.R. 122, distinguished. *Beam v. Beatty*, 207.

[An appeal to the Court of Appeal was argued on the 18th March, 1901, and judgment was reserved.]

ASSESSMENT OF DAMAGES.

See JUDGMENT, 2.

ATTACHMENT OF DEBTS.

Fraud—Issue—Amount in Controversy—County Court—Jurisdiction—Residence of Garnishee—Rules 917, 918, 919—Receiving Order.]—Where it was charged by a judgment creditor that a fraudulent arrangement had been made between the judgment debtor and his employers, the garnishees, whereby a third person had been substituted for the debtor as the servant of the garnishees, and money paid to such third person, while the debtor continued to do the work:—

Held, that the judgment creditor was entitled to have an issue directed, to which the third person should be a party, to determine whether there was at

the time of the service of the attaching order any debt due or accruing from the garnishees to the debtor; to entitle the creditor to an issue, it was not necessary to bring home a case of fraud to the persons against whom it was charged; it was sufficient to shew unexplained facts and circumstances so unusual as to create a strong suspicion that fraud had been practised.

Held, also, that the Judge of a County Court in which the judgment has been recovered has power, when the amount claimed to be due from the garnishee is so large as not to be within the jurisdiction of a County Court, to make the garnishing summons returnable before himself, even where the garnishee resides in another county.

Semble, that the proper construction of Rules, 917, 918, and 919 is, that the Judge of a County Court in which a judgment has been recovered has power, when the amount claimed to be due from a garnishee residing in another county is within the jurisdiction of the County Court or the Division Court, to order the garnishee to attend before the Judge of the County Court or the Clerk of the Division within which he lives.

Held, also, that an order for a receiver should not be made in respect of a fund which may be

reached by garnishing process.
Millar v. Thompson, 294.

See COSTS, 2; EVIDENCE, 3.

BOND.

See JUDGMENT, 4.

CAPIAS.

See ARREST.

CASES.

Allison v. Breen, 19 P.R. 119, affirmed, 143.]—*See* ACTION, 3.

Anon, 11 W.R. 293, 32 L.J. N.S. Ex. 88, 7 L.T.N.S. 718, followed, 307.]—*See* WRIT OF SUMMONS, 2.

Arnold v. Van Tuyl, 30 O.R. 663, distinguished, 149.]—*See* COSTS, ETC., 19.

Barrie, Town of, v. Weaymouth, 15 P.R. 95, followed, 33.]—*See* PARTIES, 1.

Baylis, Re, [1896] 2 Ch. 107, followed, 37.]—*See* SOLICITOR, 2.

Black v. Green, 15 C.B. 262, 3 C.L.R. 38, followed, 307.]—*See* WRIT OF SUMMONS, 2.

Boice v. O'Loane, 3 A.R. 167, followed, 143.]—*See* ACTION, 3.

Boyd v. Dominion Cold Storage Co., 17 P.R. 545, distinguished, 6.]—*See* APPEAL, 1.

Brotherton v. Metropolitan District Railway Joint Com-

mittee, [1894] 1 Q.B. 666, followed, 237.]—*See* COSTS, ETC., 16.

Campbell v. Holyland, 7 Ch. D. 166, followed, 254.]—*See* MORTGAGE.

Chambers v. Kitchen, 16 P.R. 219, distinguished, 288.]—*See* REVIVOR.

Coffey v. Scane, 22 A.R. 269, per BURTON and MACLENNAN, J.J.A., followed, and per HAGARTY, C.J.O., and OSLER, J.A., dissented from, 67.]—*See* ARREST, 1.

Confederation Life Assn. and Cordingly, Re, 19 P.R. 16, reversed, 89.]—*See* INTERPLEADER, 4.

Denier v. Marks, 18 P.R. 465, overruled, 59.]—*See* COSTS, ETC., 18.

Dickerson v. Radcliffe, 19 P.R. 223, followed, 237.]—*See* COSTS, ETC., 16.

Duffet v. McEvoy, 10 App. Cas. 300, followed, 37.]—*See* SOLICITOR, 2.

Girardot v. Welton, 19 P.R. 162, affirmed, 201.]—*See* COSTS, 13.

Gunn v. Doble, 15 Gr. 655, distinguished, 254.]—*See* MORTGAGE.

Humphries, Re, Mortimer v. Humphries, 18 P.R. 289, approved, 183.]—*See* PAYMENT INTO COURT.

Jarvis v. Great Western R. W. Co., 8 C.P. 280, followed, 12.] —See COSTS, ETC., 1.

Johnston v. Johnston, 9 P.R. 259, followed, 254.]—See MORTGAGE.

Kelly v. Imperial Loan Co., 11 S.C.R. 516, distinguished, 254.]—See MORTGAGE.

Kersterman v. McLellan, 10 P.R. 122, distinguished, 207.] —See ARREST, 2.

Koosen v. Rose, [1897] W.N. 25, 76 L.T.N.S. 145, 45 W.R. 337, 13 Times L.R. 257, distinguished, 223.]—See COSTS, ETC., 15.

Manning v. Mullins, [1898] 2 I.R. 34, followed, 227.]—See RECEIVER.

Mason v. Johnston, 20 A.R. 412, followed, 119.] — See ACTION, 2.

Mawman v. Tegg, 2 Russ. 385, 390, followed, 332.]—See PLEADING, 2.

Meriden Britannia Co. v. Braden, 17 P.R. 77, followed, 12.]—See COSTS, ETC., 1.

McVeain v. Ridler, 17 P.R. 353, discussed, 67.] — See ARREST, 1.

Page v. Wisden, 20 L.T.N.S. 435, followed, 332.] — See PLEADING, 2.

Port Rowan and Lake Shore R.W. Co. v. South Norfolk R.

Co., 13 P.R. 327, approved, 277.]—See EVIDENCE, 5.

Pritchard v. Pattison, 19 P.R. 180, affirmed, 277.]—See EVIDENCE, 5.

Shaw v. McKenzie, 6 S.C.R. 181, followed, 67.]—See ARREST, 1.

Smith v. Houston, 15 P.R. 18, discussed, 217.]—See PARTITION.

Star Life Assurance Society v. Southgate, 18 P.R. 151, followed, 145.]—See JUDGMENT, 4.

Stokes v. Latham, 4 Times, L. R. 305, followed, 9.] — See ACTION, 1.

Sutton and Elliott, Re, 11 Q. B.D. 377, followed, 271.]—See SOLICITOR, 3.

Sweet v. Maugham, 11 Sim. 51, not followed, 332.] — See PLEADING, 2.

Thompson v. Pearson, 18 P. R. 420, distinguished, 160.]—See COSTS, ETC., 6.

Tooth v. Frederick, 14 P.R. 287, followed, 67.]—See ARREST, 1.

Walmsley v. Griffith, 11 P.R. 139, considered, 316.] — See COSTS, ETC., 20.

West, Re, [1892] 2 Q.B. 102, followed, 37.]—See SOLICITOR, 2.

Willcock v. Terrell, 3 Ex. D. 323, followed, 227.]—See RECEIVER.

Young v. Brassey, 1 Ch. D. 277, followed, 333.] — See MECHANICS' LIENS.

CAUSE OF ACTION.

See PLEADING, 1.

CHARGING ORDER.

See SOLICITOR, 1.

COMPANY.

See PLEADING, 1 — WRIT OF SUMMONS, 1.

COMPENSATION.

See COSTS, ETC., 9.

CONTRIBUTION.

See PARTIES, 2.

COPYRIGHT.

See COSTS, 3 — PLEADING, 2.

COSTS AND SECURITY FOR COSTS.

[For cases of Security for Costs, see Nos. 18, 19, 20.]

1. *Recovery Against Opposite Party—Liability to Solicitor—Indemnity.*]—If the client be not liable to pay costs to his solicitor, he cannot recover these costs against the opposite party.

Jarvis v. Great Western R.W. Co. (1859), 8 C.P. 280, and

Meriden Britannia Co. v. Braden (1896), 17 P.R. 77, followed.

This rule applied to a case where the defence to an action for damages for personal injuries sustained by a workman in the employment of the defendants was undertaken by a guarantee company who had contracted to indemnify the defendants against such claims, and who employed their own solicitors to defend the action, exercising a right given by the contract; and extended, beyond the actual costs of the defence, to subsequent costs arising out of an application made by the plaintiff's solicitors, where the defending solicitors continued to act upon the retainer of the guarantee company. *Walker v. Gurney-Tilden Co.*, 12.

2. *Scale of—County Court—Defence Arising after Action—Discharge of Part of Claim—Division Court Garnishment—Payment into Court.*]—On the 5th August, 1899, a creditor of the plaintiff issued a summons out of a Division Court claiming \$64 from the plaintiff and claiming to attach moneys in the hands of the defendant, as garnishee, to answer the plaintiff's debt, and served it on both primary debtor and garnishee on the day of its issue. On the 17th August this action was brought in a County Court to recover \$133.40. On the 28th August the garnishee (the de-

fendant in this action) paid \$57.50 into the Division Court. On the 6th September judgment was given in the Division Court for the primary creditor against the primary debtor (the plaintiff in this action) for \$64 and against the garnishee for \$57.50. On the 5th October the plaintiff delivered his statement of claim for the whole \$133.40 :—

Held, that the service of the summons was no bar to this action; that the defence that the defendant was discharged as to \$57.50 by his payment into the Division Court was a defence which did not arise until the payment was made and judgment given in the Division Court, and was consequently a defence arising after action brought; and such payment and judgment could not have relation back to the time of the service of the summons; and therefore, it having been adjudged in this action that the plaintiff was entitled to the amount claimed by him, less the \$57.50, the action was properly brought in a County Court, and the plaintiff was entitled to costs on the scale of that Court. *Pickard v. Tims*, 109.

3. *Infringement of Copyright—Consent Judgment—Damages—Amount of—Reference—Offer—Payment into Court.*—Where judgment was pronounced by consent declaring that the defendant had infringed the plaintiffs' copyright, restraining

him from continuing to infringe, and directing a reference to ascertain the damages sustained by reason of the infringement, and the Master found that the damages were only \$6.70, and also reported specially that the plaintiffs were aware before action that the defendant was willing to hand over all copies of and to stop selling or giving away the publications in question, but the plaintiffs demanded \$100 compensation, and that after action the defendant offered to pay \$25 for damages and costs and to deliver up any of the publications on hand and to give an undertaking that there would be no further infringement, but the plaintiffs did not accept the offer :—

Held, that the plaintiffs were entitled to the costs of the action; and also to the costs of the reference, the defendant not having, when consenting to judgment, offered to pay a fixed sum for damages and to pay it into Court. *Anglo-Canadian Music Publishing Association v. Somerville*, 113.

4. *Scale of—Drainage Act—Reference.*—Section 113 of the Drainage Act, R.S.O. ch. 226, providing that the tariff of the County Court shall be the tariff of costs under that Act, applies only to actions which ought properly to have been instituted by notice under sec. 93, and not to actions which might properly be brought notwithstanding the

Drainage Act, and which are referred to the Referee under sec. 94 only because the Court thinks they may be more conveniently disposed of by him. *McCulloch v. Township of Caledonia*, 115.

[See 5, 10.]

5. *Scale of—Drainage Act—Reference.*]—Where an action is brought to recover damages for injury to property by the construction of drainage works, and the claim is within the scope of sec. 93 of the Drainage Act, R.S.O. ch. 226, under which proceedings before the Drainage Referee may be taken without bringing an action, and an order is made referring the action to the Referee for trial, the costs should be taxed according to the tariff of the County Courts, under sec. 113. *Moke v. Township of Osnabruck*, 117.

[See 4, 10.]

6. *Scale of—Jurisdiction of County Courts—Ascertainment of Amount—Price of Goods Sold.*]—In an action for the price of goods sold and delivered, in which the plaintiff recovered \$290, it was contended that that amount was ascertained by the act of the parties, and therefore within the jurisdiction of the County Courts, because the goods were sold according to a price list agreed to, and therefore the amount was ascertainable by a simple computation:—

Held, not so.

Thompson v. Pearson (1899), 18 P.R. 420, distinguished. *Evans v. Chandler*, 160.

7. *Counterclaim—Relief Obtainable without Cross-action—Set-off.*]—The counterclaim of a defendant, properly so-called, is a claim by the defendant for a relief which cannot be obtained by him in the action; and calling a claim made by the defendant a counterclaim cannot make it one.

The plaintiff claimed a declaration that his interest as a chargee upon land could not be sold under the power in the defendant's mortgage upon such land, and, in the alternative, that he was entitled to redeem the defendant. By her pleading in answer the defendant alleged certain facts justifying her right to exercise the power of sale, and "by way of counterclaim" claimed payment of her mortgage, sale or foreclosure, possession, costs, and damages. The action was at the trial dismissed with costs, the defendant not desiring a foreclosure, which she was offered:—

Held, that the relief claimed by the defendant was obtainable by her in the action brought against her, and was not the subject of a cross-action or counterclaim; and the only costs taxable by the plaintiff against the defendant were such costs as were occasioned to the plaintiff by reason of the claim made by the defendants, treat-

ing it as a claim properly made in the action and dismissed; and such costs should be set off *pro tanto* against the defendant's costs of the dismissal of the action. The judgment dismissing the "counterclaim" with costs meant that such costs should be taxed as were appropriate to it in its true character.

Semble, that in this Province the law as to set-off is different from the English law, and here a set-off should not be treated as a counterclaim nor be pleaded as such. *Girardot v. Welton*, 162.

[Affirmed, post 13].

8. *Slander—Verdict for \$1.*]—Where, in an action of slander, the jury returned a verdict for the plaintiff for \$1, the trial Judge refused to deprive the plaintiff of costs, his conduct not having been reprehensible, and the small verdict being explained by the condition of the defendant at the time the words were uttered. *Bell v. Wilson*, 167.

9. *Will—Action to Set aside—Failure of—Dismissal without Costs—Costs out of Estate—Administration.*]—In an action to set aside a will for undue influence by two of the defendants, one of whom was the executor, the attack failed, and the action was dismissed, but without costs as to these two defendants, there being circumstances which might, unexplained, appear to be suspicious.

The other defendants, two pecuniary legatees under the attacked will, and a religious society to whom land was devised by it, submitted their rights to the Court, but appeared by counsel at the trial, and joined in resisting the plaintiffs' claim:—

Held, that these defendants were in a position similar to that of "interveners" under the English procedure, and were not entitled to costs out of the estate:—

Held, also, that they were not entitled to costs against the plaintiffs:—

Semblé, that they would be entitled to compensation in the administration of the estate. *Logan v. Herring*, 168.

10. *Scale of—Appeal from Judgment of Drainage Referee.*]—Having regard to secs. 111, 112, and 113 of the Municipal Drainage Act, R.S.O. ch. 226, and no tariffs of fees having been framed thereunder, the tariff of the County Court applies, not only to proceedings before the Drainage Referee, but to appeals from his decisions; and therefore the basis of taxation of the costs of an appeal to the Court of Appeal from the decision of the Referee should be the County Courts tariff. *Re Township of Metcalfe and Townships of Adelaide and Warwick—Re Township of Colchester North and*

Township of Gosfield North,
188.

[See 4, 5.]

11. *Mechanic's Lien—Appeal*—*R.S.O. ch. 153, secs. 41, 42, 45.*—Sections 41 and 42 of the Mechanics' and Wage-Earners' Lien Act, R.S.O. ch. 153, limiting "the costs of the action under the Act" to twenty-five per cent. of the judgment, besides actual disbursements, do not apply to the costs of an appeal from the decision of the Judge or officer trying the action.

Seemle, that the costs of such an appeal are within the scope of sec. 45. *Gearing v. Robinson*, 192.

12. *Scale of—County Court*—*Payment into Court—Sum within Competence of Division Court—Acceptance by Plaintiff—Order for Set-off—Finality—Appeal.*—The plaintiff in an action in a County Court claimed \$140, the balance alleged to be due upon the sale of a chattel, and the defendant brought into Court \$95 in full of the plaintiff's cause of action, which the plaintiff accepted in due time. The Judge of the County Court thereupon made a summary order allowing the defendant to set off his costs incurred in the County Court in excess of such costs as he would have incurred in a Division Court against the costs of the plaintiff, and to enter judgment and issue execu-

tion for the excess, if any, of the costs of the defendant over and above the costs of the plaintiff:—

Held, that the plaintiff was entitled to tax his costs of the action according to the County Court scale, irrespective of the amount paid into Court and accepted by him in satisfaction of his claim; and the plaintiff being entitled to his costs by the express provision of Rule 425 (which is not qualified by Rule 1130), they were not subject to the discretion of the Judge.

Held, also, that the order of the Judge was in its nature final, and therefore appealable under sec. 52 of the County Courts Act, R.S.O. ch. 55. *Babcock v. Standish*, 195.

13. *Counterclaim—Relief obtainable without Cross-action—Set-off—Rules 1164, 1165—Order of Revivor.*—Decision of ARMOUR, C.J., *ante* 7, as to costs taxable by the plaintiff upon a judgment dismissing a so-called counterclaim, affirmed.

Held, also, that such costs were interlocutory costs within the meaning of Rule 1165; and, if not, that they were costs falling within Rule 1164, and subject to the discretion of the taxing officer in setting them off against the defendant's costs of the action.

Held, also, that costs of an order of revivor obtained by the plaintiff after judgment in order

to tax his costs, should be taxed to him and added to his other costs and set off against the defendant's costs. *Girardot v. Welton*, 201.

14. *Taxation — Mortgagor and Mortgagee—Appeal.*]—No appeal lies from the taxation of a mortgagee's costs of proceedings under the power of sale in a mortgage, had under R.S.O. 1897 ch. 121, sec. 30. *Re Vanluven and Walker*, 216.

15. *Interlocutory Order — "Costs in the Cause"—Discretion of Trial Judge.*]—Where an interlocutory order in an action directs that the costs of certain proceedings shall be "costs in the cause," that is not a final disposition of such costs in favour of the party who shall succeed in the action, but merely puts these costs in the same position as any other of the ordinary costs of the action, that is, leaves them to be dealt with in the discretion of the trial Judge under Rule 1130 and sec. 119 of the Judicature Act, R.S.O. 1897 ch. 51.

Koosen v. Rose, [1897] W.N. 25, 76 L.T.N.S. 145, 45 W.R. 337, 13 Times L.R. 257, distinguished. *Dickerson v. Radcliffe*, 223.

[See the next case.]

16. *Interlocutory Order — "Costs in the Cause"—Discretion of Trial Judge.*]—The judgment of the trial Judge

was in favour of the plaintiff, and was not appealed against. As to costs, it adjudged that the defendants should pay to the plaintiff the costs of certain witnesses, and continued: "This Court doth not see fit to interfere with the interlocutory orders disposing of certain costs throughout the action, nor make any further or other order as to costs."

Two interlocutory orders made the costs of applications "costs in the cause;" two made them "costs in the cause to the successful party;" one order provided that "the defendant do pay to the plaintiff the costs of this motion to be taxed in any event of the cause but on the final taxation of the costs herein."

It was conceded that the plaintiff was entitled to the costs made payable in any event:—

Held, following *Dickerson v. Radcliffe*, *ante* 15, that the costs made costs in the cause were subject to the disposition of the trial Judge, and under the judgment were not to be taxed to the plaintiff:—

Held, also, that the words "costs in the cause to the successful party" did not mean more than costs in the cause; and, even if they did, the plaintiff was not a successful party.

Brotherton v. Metropolitan District Railway Joint Committee, [1894] 1 Q.B. 666, followed. *Murr v. Squire*, 237.

17. *Taxation — Affidavits — Irregular Filing.*—The costs of affidavits for use on a motion in the Weekly Court filed with the Clerk in Chambers, instead of in the Registrars' office, as required by Rule 102, should nevertheless be taxed, if otherwise taxable, where such affidavits have been before the Court on the motion, and are recited in the order made thereon. *Sturgeon Falls Electric Light and Power Co. v. Town of Sturgeon Falls*, 286.

18. *Security for Costs—Residence Out of Ontario—“Ordinarily Resident”—Rule 1198.*—Rule 1198 provides that security for costs may be ordered, among other cases, in the following: “(a) Where the plaintiff resides out of Ontario; (b) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario.”

The defendant's affidavit stated that the plaintiff was now residing out of the jurisdiction; and also that he had no certain place of abode within the jurisdiction; that he had hitherto resided out of the jurisdiction; and at the conclusion of the pending suit intended to reside out of the jurisdiction. The plaintiff's affidavit stated that he had not for the past year nor had he now any fixed or ordinary place of abode either in or out of the Province of Ontario, his occupation requiring that he

should be from time to time in England, the Province of Ontario, and the Province of New Brunswick :—

Held, that the actual residence abroad was still what *prima facie* entitled the defendant to security, and the plaintiff could not answer the application by shewing that he had no fixed residence at all.

Denier v. Marks (1899), 18 P.R. 465, overruled.

Judgment of a Divisional Court reversed. *Allcroft v. Morrison*, 59.

19. *Appeal to Divisional Court—Rule 825.*—Rule 825, providing that no security for costs shall be required on a motion or appeal to a Divisional Court, does not preclude a defendant from obtaining an order for security for costs where the plaintiff has taken up his residence abroad after a judgment dismissing his action without costs, from which his appeal to a Divisional Court is pending.

Arnold v. Van Tuyl (1899), 30 O.R. 663, distinguished. *Tanner v. Weiland*, 149.

20. “*Plaintiff*” — *Claim by Defendants against Co-defendant—Rules 215, 1198.*—Where a defendant proceeds under Rule 215 to seek relief from a co-defendant which he would not be entitled to upon the pleadings and proofs between the plaintiff and defendants, he is a “plaintiff” within

the meaning of Rule 1198, and, if resident out of the jurisdiction, is liable to an order for security for costs.

Walmsley v. Griffith (1885), 11 P.R. 139, considered. *Molsons Bank v. Sawyer*, 316.

See ACTION, 1—ALIMONY—APPEAL, 1, 4—EVIDENCE, 5—INJUNCTION, 2—INTERPLEADER, 6—JUDGMENT, 1, 3—PARTIES, 1—PAYMENT INTO COURT—REVIVOR—SOLICITOR.

COUNSEL.

See ACTION, 1.

COUNTERCLAIM.

See COSTS, ETC., 7, 13—JUDGMENT, 7

COUNTY COURTS.

See ATTACHMENT OF DEBTS—COSTS, 2, 6, 12.

COURT OF APPEAL.

See APPEAL, 1.

CREDITORS' RELIEF ACT.

See RECEIVER.

CROWN.

See RECEIVER.

DAMAGES.

See COSTS, 3—JUDGMENT, 2, 4.

DEFAMATION.

See COSTS, 8—DISCOVERY, 4—JUDGMENT, 2—PLEADING, 1.

DISBURSEMENTS.

See ALIMONY.

DISCOVERY.

1. *Inspection of Buildings—Occupation of Tenants—Rule 571.*]—Rule 571, though not so limited in express terms, must be construed so as to be confined to cases in which the property of which inspection is sought is in the possession, custody, or control of the party against whom the order is desired.

The plaintiff sued for damages for breaches of the covenants to repair and to leave the premises in good repair contained in a lease from her to the defendants' assignor, for which she claimed that the defendants were answerable. The defendants were mortgagees of the lease, and had not themselves been in the actual occupation of the premises. At the time of the action the buildings and premises in question were not in the occupation of the plaintiff, but in that of her tenants:—

Held, that an order for inspection by the defendants should

not be made. *Hills v. Union Loan and Savings Co.*, 1.

2. *Action for Account—Denial of Right—Production of Books—Prejudice.*—To an action by an incorporated association of cheesemakers against the president and salesman for an account of all moneys received by him for or on behalf of the plaintiffs for three years past, and the application thereof, and for delivery up of all books and documents in his possession belonging to the plaintiffs, and for an account of profits made by the defendant, one of the defences was that the defendant undertook the sale of the plaintiffs' cheese as a part of his own business, and that it was expressly agreed that he should not be called upon to divulge the names of the persons from whom he received orders, or give any other information touching his business or the account of sales or the bank account in connection with his business, and when examined for discovery he objected to produce his books and documents shewing sales and prices realized and persons to whom sales made, because, as he alleged, that would in effect give the plaintiffs what they sought in the action before they had established their right to it, which was expressly contested:—

Held, that, as the fiduciary relationship existing between the parties was practically admitted,

the position of the plaintiffs in seeking accounts and inquiries was not exactly like that of a plaintiff whose right depended on his establishing a case for them at the hearing. The defendant set up an extraordinary agreement, the probability of establishing which was not very great, and this was an element in determining the matter in the exercise of a sound discretion. The plaintiffs were, therefore, entitled to the discovery. *Sydney Cheese and Butter Factory Association v. Brower*, 152.

3. *Examination of Party—Appointment—Service—Enlargement—Default of Attendance—Rules 443, 446.*—The plaintiff obtained from the proper officer an appointment for the examination for discovery of the defendant; the defendant's solicitor was served with a copy of the appointment more than forty-eight hours before the time appointed for the examination, but the defendant himself was not served. At the appointed time and place the plaintiff's solicitor attended before the officer, but neither the defendant nor his solicitor attended, and the officer enlarged the appointment till the next day (the 7th), and on the 7th, the defendant still not having been served, and neither he or his solicitor attending, the officer enlarged the appointment till the 8th. On the 7th the defendant was served with the ap-

pointment for the 8th and with a subpoena, and was paid his conduct money, and his solicitor was on the 7th notified by letter of the enlargement till the 8th:—

Held, that the defendant was in default for not attending for examination on the 8th.

Rules 443 and 446 construed. *Reid v. Walters*, 310.

4. *Defamation — Justification—Immorality—Disclosure of Name of Paramour.*—The defendants having in their newspaper charged the plaintiff with immorality, he sued them for libel, and the defendant pleaded that the charges were true. The plaintiff having required particulars, the defendants set forth that he lived at a house of ill-fame; that he lived at a particular place in adultery; that a child was born to the woman with whom he lived; and that he brought to his house and kept with the members of his family a woman who had lived in a house of ill-fame. The plaintiff, being examined for discovery, admitted that he had lived in adultery with a woman who had previously lived in a house of ill-fame, and that she bore a child of which he was not the father, but denied the other allegations of the particulars:—

Held, that the plaintiff was bound to disclose the name of the woman, although such disclosure might injure her. *Mac-*

donald v. Sheppard Publishing Co., 282.

See EVIDENCE, 1, 2, 3, 5—JUDGMENT, 6.

DISCRETION OF HIGH COURT.

See APPEAL, 5.

DISCRETION OF TAXING OFFICER.

See PAYMENT INTO COURT.

DIVISION COURTS.

See COSTS, 2, 12.

DIVISIONAL COURT.

See COSTS, 19.

DRAINAGE.

See COSTS, 4, 5, 10—LOCAL MASTER.

EQUITABLE EXECUTION.

See RECEIVER, 1.

EVIDENCE.

1. *Discovery — Negligence—Absence of Safeguards—Subsequent Placing.*—Where an injury is alleged to have been caused by the negligence of the defendant in not furnishing proper safeguards at some place of danger, evidence of safeguards placed there by him

after the injury is not admissible for the purpose of shewing his prior negligence; and upon an examination for discovery the defendant is justified in declining under advice to answer questions relating to such subsequent placing. *Cole v. Canadian Pacific R. W. Co.*, 104.

2. *Motion — Security for Costs—Nominal Plaintiff—Insolvency.*—The plaintiff, being examined by the defendant as a witness upon a motion made by the defendant to set aside the proceedings and dismiss the action or for security for costs, on the ground that the plaintiff had no interest in the company on behalf of whose shareholders as well as himself he was suing, was asked what means he had of satisfying the costs in the action :—

Held, that the defendant could not interrogate the plaintiff as to his financial position until, at least, a *prima facie* case had been made out that he was only the nominal, and not the real and substantial plaintiff; and the evidence given upon the motion before the examination of the plaintiff shewed that he had a substantial interest. *Pritchard v. Pattison*, 180.

[Affirmed, *post* 5.]

3. *Cross-examination on Affidavit—Proper Questions—Attachment of Debts—Salary of Municipal Officer—Advances—*

By-law — Production.] — An order having been made attaching all debts due to a judgment debtor by a city corporation, a person describing himself as “paying teller” of the corporation made an affidavit in answer to the judgment creditor’s application for a garnishing order absolute, stating that nothing was due from the corporation to the debtor at the time of service of the attaching order. Cross-examined upon his affidavit, the affiant said that the debtor was assessment commissioner for the corporation and in receipt of a salary, but that advances had been made to him on account of it, by the authority of the treasurer of the city, so that nothing was due. The affiant declined to answer certain questions put to him on cross-examination :—

Held, that the affiant should be compelled to answer all questions put to him bearing on the advances made in the past to the debtor, and those bearing on the affiant’s authority to make them, and his motives in doing so if he were exercising a discretion

Held, also, STREET, J., dissenting, that the affiant should answer the question whether he had ever made advances on account of salary to any other employee of the city, and if he should answer it in the affirmative, he might be further interrogated as to the number of

such instances, but he was not to be compelled to disclose the names of persons to whom such advances had been made.

Held, also, that the affiant was not compellable to produce any of the city by-laws, not being the custodian thereof. *Wilson v. Fleming*, 203.

4. *Leave to Adduce Fresh Evidence after Judgment in Appeal*—*Rule 498—Amendment of Record after Judgment.*—After the judgment of the Court of Appeal affirming the judgment of the trial Judge dismissing the action, had been drawn up and entered, and while an appeal was pending therefrom to the Supreme Court of Canada, the plaintiffs moved for leave to adduce further evidence for the purpose of shewing that an exhibit which was used as part of the evidence in the case was not a true copy of the original document. It was not suggested that there was any error in the judgment of the Court of Appeal which could be corrected by the introduction of the proposed evidence, or that, if the proposed evidence had been given while the appeal was pending, the judgment would have been different. It might tend to displace one of the grounds on which the trial Judge relied, or might prevent the defendants from relying upon that ground if the case went further, but that was all that could be said :—

Held, that the application must be refused.

Rule 498, which empowers the Court to receive further evidence, is clearly confined to cases where such evidence is sought to be introduced for the purpose of the appeal. *Dueber Watch Case Manufacturing Co. v. Taggart*, 233.

5. *Motion—Security for Costs—Nominal Plaintiff—Insolvency—Affidavit—Notice of Motion.*—The decision of ROSE, J., *ante* 2, affirmed on appeal; STREET, J., dissenting.

Held, *per* BOYD, C., that an application for security for costs on the ground that the plaintiff is insolvent and is only nominally interested in the action, should be based on an affidavit of belief on the defendant's part that such are the facts, and such an affidavit should at least be furnished by the defendant before he attempts to establish the facts by examining the plaintiff.

Semble, that the proper practice in such a case is to have the grounds set forth in the notice of motion, as was done in *Port Rowan and Lake Shore R. W. Co. v. South Norfolk R. W. Co.* (1889), 13 P.R. 327; and if this method were adopted, an affidavit of belief might be dispensed with if it was proposed to establish the facts alleged out of the mouth of the plaintiff.

Held, per FALCONBRIDGE, C.J., that the finding of ROSE, J., that the plaintiff had a substantial interest, should be adopted, and such being the position, the defendant had no right to prove the plaintiff's poverty out of his own mouth on this application.

Per STREET, J., dissenting, that the defendant was entitled to examine the plaintiff for the purpose of shewing that he was a mere nominal plaintiff suing for the benefit of another, as well as for the purpose of shewing his insolvency; and the defendant could not be required to establish each particular proposition involved in his motion, in its logical order, before proceeding with the next.

Leave was given to the defendant to proceed in proper form with his application for security. *Pritchard v. Pattison*, 277.

EXAMINATION.

See DISCOVERY, 2, 3, 4 — EVIDENCE, 1, 2, 3, 5 — JUDGMENT, 6.

EXECUTION.

See INTERPLEADER, 6 — RECEIVER—SOLICITOR, 1.

FORECLOSURE.

See MORTGAGE.

FOREIGN CLAIMANTS.

See INTERPLEADER, 1, 3, 4.

FOREIGN CORPORATION.

See WRIT OF SUMMONS, 1.

FOREIGN GUARDIAN.

See MONEY IN COURT.

GARNISHMENT.

See ATTACHMENT OF DEBTS.

GUARDIAN.

See PARTITION.

INDEMNITY.

See COSTS, 1—PARTIES, 2.

INJUNCTION.

1. *Interim Injunction—Motion to Dissolve.*]—Where an interim injunction has been granted until a day certain, and a motion to continue it must be made if it is desired to extend it beyond such day, no motion to dissolve is necessary, except where it is sought to get rid of it in the meantime. *McCuaig v. Conmee*, 45.

2. *Stay of Proceedings—Security for Costs.*]—An order for security for costs made pursuant to Rule 1199, and issued according to Form 95, has the effect of staying all further proceedings until security is given; and while such order stands, it is not competent for the plaintiff to proceed with

a pending motion for an injunction against the defendant who has obtained the stay, but such motion should be enlarged till the security is perfected. *Weekes v. Underfeed Stoker Co. of America*, 299.

INSOLVENCY.

See EVIDENCE, 2, 5.

INSPECTION.

See DISCOVERY, 1.

INSURANCE.

See INTERPLEADER, 1, 4, 5.

INTERPLEADER.

1. *Summary Application—Rule 1103 (a)—Insurance Moneys—Adverse Claims—Foreign Claimants—Notice of Motion—Service out of Jurisdiction—Rule 162 (3).*—Certain moneys were payable by an insurance company under several life policies in favour of the assured, his executors, administrators, or assigns. The moneys were claimed by the executors, who resided in Manitoba, where the assured died, and who were threatening suit there, and also by the widow, who resided in Quebec, and had brought an action against the company there. The company's head office was in Ontario, and they launched an application in

the High Court for a summary interpleader order:—

Held, reversing the decision of MEREDITH, C.J., that they were not entitled to avail themselves of the provisions of Rule 1103 (a), as persons under liability for a debt in respect of which they were, or expected to be, sued by two or more persons, because no action was brought or threatened within Ontario; and therefore service out of Ontario of the company's notice of motion for the interpleader order should not have been allowed under Rule 162 (3) or otherwise. *Re Confederation Life Association and Cordingly*, 16.

[Reversed on appeal, *post* 4.]

2. *Refusal of Application by Sheriff—Claimant—Appeal—Summary Decision—Question of Fact—Rule 1111—Abandonment of Seizure—Issue—Re-seizure.*—Where an application was made by a sheriff for an interpleader order in respect of goods seized by him under an execution against the plaintiff, and claimed by a brother of the plaintiff as purchaser of the goods, the Judge, assuming to act under Rule 1111, decided the question in favour of the claimant, without directing the trial of an issue, and made an order refusing the application, directing the sheriff to withdraw from possession of the goods, ordering the execution creditors to pay the sheriff's

costs and possession money and the claimant's costs, and directing that no action should be brought by the claimant against the sheriff in respect of the seizure :—

Held, that the execution creditors had the right to appeal against this order.

The execution creditors did not dispute the claimant's title to the goods by purchase from one to whom they were sold by the plaintiff's assignee for creditors, but contended that the claimant's present professed ownership was a mere sham and a fraud contrived to enable the plaintiff to carry on business independently of the demands of his creditors :—

Held, that the question presented was not one of law, but of fact, and an issue should have been directed.

But, the sheriff having relinquished possession of the goods pending the appeal, it was too late to direct an issue; and unless the parties could agree upon one, the proper course would be for the execution creditors to seize again. *Rondot v. Monetary Times Printing Co. of Canada*, 23.

3. *Summary Application—Rule 1103 (a)—Money in Bank—Adverse Claims—Foreign Claimants—Discretion.*]—A summary application under Rule 1103 (a) for an interpleader order in respect of certain moneys deposited with the de-

fendants in England, and claimed by the plaintiff by this action brought in Ontario, and also in England by the depositors, an English corporation, was dismissed :—

Held, that the mere fact that an action was possible here, because a branch office of the bank was in Toronto, was not enough to attract to this forum the extraordinary or special remedy by way of interpleader, as against the English corporation; and a salutary discretion was exercised in refusing the application. *Harris v. Bank of British North America*, 51.

4. *Summary Application—Rule 1103 (a)—Insurance Moneys—Adverse Claims—Foreign Claimants—Notice of Motion—Service Out of Jurisdiction—Rule 162 (3).*]—Certain moneys were payable by an insurance company under several life policies in favour of the assured, his executors, administrators, or assigns. The moneys were claimed by the executors, who resided in Manitoba, where the assured died, and who were threatening suit there, and also by the widow, who resided in Quebec, and had brought an action against the company there. The company's head office was in Ontario, and they launched an application in the High Court for a summary interpleader order :—

Held, reversing the decision of a Divisional Court, 19 P.R.

16, and restoring that of MEREDITH, C.J., *ib.* (see *ante* 1), that the company were entitled to avail themselves of the provisions of Rule 1103 (a), as persons under liability for a debt in respect of which they were, or expected to be, sued by two or more persons; and service out of Ontario of the company's notice of motion for the interpleader order was properly allowed under Rule 162 (3). *Re Confederation Life Association and Cordingly*, 89.

5. *Issue—Parties—Onus.*]

Where the proceeds of a life insurance policy were claimed by the widow of the assured and also by an assignee for value, and it appeared that the assured had first made a declaration in writing on the policy devoting all the benefit to his wife, and had subsequently by writing assumed to limit such benefit to \$1, and had then made the assignment to the other claimant:—

Held, that the latter should be plaintiff in an interpleader issue ordered to be tried between the claimants. *Re Hubbell*, 240.

6. *Writ of Possession—Interference with Execution—Claim to Land—Costs.*]

Upon an attempt to execute a writ of possession under a judgment against G., who was in actual possession, the sheriff was served with a notice by B. claiming the land mentioned in the writ, and in-

forming the sheriff that the house standing thereon was locked and that he (B.) had the key. B.'s claim was as mortgagee upon default in payment of interest:—

Semble, that the sheriff's duty, as soon as he received the writ, was to break open the door and give the plaintiff possession. But

Held, that, as the sheriff was not bound to consider the legality of the claim put forward, he was entitled to an interpleader order.

Costs of the sheriff ordered to be paid in the first instance by the party putting him in motion. *Hall v. Bowerman*, 268.

IRREGULARITY.

See APPEAL, 5.

JOINDER OF CAUSES OF ACTION.

See PLEADING, 1.

JUDGMENT.

[For cases of Summary Judgment, see Nos. 5, 6, 7.]

1. *Default—Writ of Summons—Special Indorsement—Nullity—Abandonment of Action—Joint Contractors—Release of Some after Judgment—Effect of—Costs.*]

Order in 18 P.R. 473 varied. *Hoffman v. Crerar*, 15.

2. *Interlocutory Judgment—Assessment of Damages—Slander—Rule 578.*]—The action was commenced by a writ of summons indorsed, "The plaintiff's claim is for damages for slander." No appearance having been entered, the plaintiff signed interlocutory judgment against the defendant according to Form 146, and set the cause down for assessment of damages at a sittings of the High Court:—

Held, that there being nothing to shew that the action was brought under sec. 5 of the Act respecting Libel and Slander, R.S.O. ch. 68, it must be treated as an ordinary action of slander; Rule 578 therefore applied to the case; the delivery of a statement of claim was unnecessary; and the plaintiff had the right to sign interlocutory judgment and have the damages assessed as she proposed.

Origin of Rule 578. *Stanley v. Litt*, 101.

3. *Default of Defence—Ex Parte Application—Defence Filed after Default Note—Motion to Set Aside Judgment—Costs—Rules 263, 358, 586.*]—A statement of defence filed after the pleadings have been noted as closed for default of defence under Rule 263, is irregular, but not a nullity, and should be regarded as evidence of an intention to defend; and where, as now permitted by Rule 586, a motion for judgment upon the statement of

claim is made *ex parte*, and the fact of the defence having been filed is brought to the knowledge of the Judge, he should direct notice to be served in order to give the defendant an opportunity to make his defence regular.

In this case judgment having been granted *ex parte*, it was ordered that there should be no costs of the defendant's motion for relief under Rule 358, which was granted. *Jackson v. Gardiner*, 137.

4. *Action on Bond—Rule 580—Writ of Summons—Special Indorsement—Statement of Claim—Service by Posting—Rule 574—Motion for Judgment—Assessment of Damages.*]—An action against the sureties in an appeal bond to recover the plaintiffs' costs of an appeal is in the nature of a claim for damages requiring assessment (see Rule 580), and a special indorsement of the writ of summons is inappropriate, and a judgment for default of appearance or default of defence is a nullity not curable by delay or acquiescence.

The defendants in this case not having appeared, the plaintiffs filed and posted up copies of a statement of claim, without filing the writ of summons and affidavit of service:—

Held, that the posting of the statement could not, having regard to Rule 574, be treated as a service upon the defendants.

But, even if it could be so treated, a motion for judgment thereon and an assessment of damages would be necessary.

Star Life Assurance Society v. Southgate (1898), 18 P.R. 151, followed. *Appleby v. Turner*, 145.

5. *Summary Judgment—Rule 603—Mortgage Action—Claim for Immediate Possession—Recovery of Land—Rules 138, 141.*—A writ of summons was indorsed under Rule 141 with claims for foreclosure of a mortgage, and for immediate recovery of possession of the mortgaged premises, and for immediate payment of the mortgage money:—

Held, that it could not be said to be specially indorsed under Rule 138 so as to entitle the plaintiffs to move under Rule 603 for summary judgment for recovery of land.

Decision of a Divisional Court affirmed. *Supreme Court of the Independent Order of Foresters v. Pegg*, 80.

6. *Summary Judgment—Rule 616—Dismissal of Action—Admissions on Examination for Discovery—Disclosing Case.*—The Court or a Judge has power, in a proper case, to dismiss the action on an application under Rule 616.

In an action to recover a debt alleged to have been due by the defendant to the plaintiff's deceased father, the claim for

which was assigned to the plaintiff by her mother, as administratrix of the father's estate, the plaintiff, on being examined for discovery, admitted that she had no personal knowledge on which she could succeed, but was relying on an entry made in a book belonging to her father that he had lent the defendant money on a certain day:—

Held, that she could not be obliged to tell what evidence she was going to use nor what witnesses she meant to call: she could have been asked if she had disclosed her whole case; but, not having been asked that, it was open for her to say that she had evidence of facts outside those within her own knowledge which might tend to establish her case; and the action should not be dismissed. *Coyle v. Coyle*, 97.

7. *Summary Judgment—Rule 603—Recovery of Land—Money Claim—Counter-claim—Trial.*—The defendant having entered into possession of land which he had contracted to purchase from the plaintiffs, and having, as alleged, made default in payment of instalments of the purchase money, the plaintiffs brought an action against him to recover possession of the land and also for a money demand. The writ of summons being specially indorsed, and the plaintiffs having moved for summary judgment

under Rule 603, the defendant set up that he had been induced to enter into the contract, and to make the purchase of certain chattels out of which the money demand arose, by fraud and misrepresentation, for which he intended to counterclaim, and that nothing was due to the plaintiffs in respect of their money demand. The Master ordered judgment for the recovery of the land, but stayed the operation of it until after judgment upon the plaintiffs' other claim and the defendants' counterclaim, which he allowed to go to trial:—

Held, reversing this order, that many serious questions might arise at the trial as to the recovery of the land and the terms upon which it might be recovered, and the trial Judge ought not to be hampered with a final judgment for the recovery of the land in adjudicating upon the questions likely to arise upon the trial of the action. *Spears v. Fleming*, 127.

See ACTION, 2, 3—ADMISSIONS—APPEAL, 3, 5—COSTS, 3—EVIDENCE, 4

JURISDICTION OF COUNTY COURTS.

See COSTS, 6.

JURISDICTION OF HIGH COURT.

See SOLICITOR, 2.

JURISDICTION OF LOCAL MASTER.

See LOCAL MASTER.

JURISDICTION OF MASTER.

See PARTITION.

JURY NOTICE.

Jury Notice—Exclusive Jurisdiction of Chancery—R.S.O. ch. 51, sec. 103—Legal and Equitable Issues—Rule 551.—The plaintiffs' claim was to enforce a charge against the defendant's lands and for a personal order or judgment for immediate payment of the sum for which they asserted the charge:—

Held, not such an action as would have been, before the Administration of Justice Act of 1873, within the exclusive jurisdiction of the Court of Chancery, within sec. 103 of the Judicature Act, R.S.O. ch. 51.

There being, therefore, legal and equitable issues raised, and notice for a jury given, Rule 551 applied, and the action should be entered for trial at a jury sittings. *Sawyer v. Robertson*, 172.

LANDLORD AND TENANT.

See DISCOVERY, 1.

LEAVE TO APPEAL.

See APPEAL.

LIEN.

See MECHANICS' LIENS.

LIMITATION OF ACTIONS.

See ACTION, 2, 3.

LOCAL MASTER.

Jurisdiction — Referring Actions to Drainage Referee.

—A local Master of the High Court has jurisdiction, by virtue of Rules 42 and 49—see also Rule 6 (a)—to make an order, under sec. 94 of the Municipal Drainage Act, R.S.O. 1897 ch. 226, referring an action brought in his county to the Referee under the Drainage Laws. *McKim v. Township of East Luther*, 248.

LUNATIC.

See MONEY IN COURT.

MAINTENANCE.

See MONEY IN COURT.

MANDAMUS.

Municipal Corporations—Statutory Duty — Prerogative Writ—Summary Application — Action — Affidavits, Intituling of.]—When a public body is required to perform a statutory duty at the instance of one

entitled to call for such performance, the practice in England is to move summarily for the prerogative writ of mandamus, according to the prescribed procedure in the Crown office.

But in this Province all the Divisions have co-ordinate jurisdiction; and the practice in cases of the prerogative writ is assimilated to that in ordinary applications of a summary nature: see Rules 1084, 1090, 1091, 1092.

And where a meritorious application was made, in an action, for a mandamus to compel a city corporation to levy a special rate for library purposes under the Public Libraries Act, R.S.O. 1897 ch. 232, it was directed that the affidavits should be re-sworn and intituled as in an application (not in an action) for the prerogative writ. *Toronto Public Library Board v. City of Toronto*, 329.

MECHANICS' LIENS.

Mechanics' Liens — Writ of Summons—Service Out of Jurisdiction—Statement of Claim—Time for Delivering Defence—Trial—Appointment in Writing—Notice of Trial.]—An order permitting service out of the jurisdiction of the writ of summons should also authorize service of the statement of claim at the same time and fix a time for delivery of the statement of defence.

Young v. Brassey (1875), 1 Ch. D. 277, followed.

Where the order makes no provision as to the statement of claim or defence, the defendant should have eight days from the last day for appearance within which to deliver his statement of defence, and the pleadings cannot be noted closed before the expiry of such eight days.

Under sec. 35 (1) of the Mechanics' Lien Act, R.S.O. 1897 ch. 153, the Judge or officer fixing a day for the trial of an action brought under that Act, is to do so in writing; and a notice of trial under that section given by a party who has not obtained a signed appointment from the Judge or officer, is not effective. The notice of trial must be served at least eight clear days before the day fixed, as provided by sec. 36. *McIver v. Crown Point Mining Co.*, 333.

MONEY IN COURT.

Payment Out—Life-Tenant—Lunatic—Foreign Guardian—Maintenance.]—During the infancy of the defendant \$2,000 was paid into Court, to one-half of which she was entitled on attaining majority, and to the other half after the death of her mother. The defendant having come of age, but being of unsound mind, and residing abroad with her mother, who had been appointed her guardian by a foreign Court, the

mother applied for payment out of the whole fund, having given in the foreign Court specific security for the amount:—

Held, as to the half of the fund in which the applicant had a life interest, that it might be paid out to proper trustees appointed to administer and safeguard it, or it might be paid out to the applicant upon substantial security being given.

Held, as to the other half, that, being actually in the hands of the Court, it was subject to the jurisdiction of the Court, and should be applied for the support and maintenance of the person of unsound mind, in the discretion of the Court—whatever sum should be shewn to be necessary for maintenance being paid to the foreign guardian. *Re Thompson—Thompson v. Thompson*, 304.

MORTGAGE.

Foreclosure—Mortgagee in Possession—Account of Rents—New Day—Final Order—Rights of Purchaser after Decree—Parties—Power of Sale.]—Mortgagees had been in possession of several of the parcels of land comprised in their mortgage before they commenced an action for foreclosure. In that action the usual judgment was pronounced, and while the reference thereunder was pending the plaintiffs agreed to sell some of the parcels

to B. in case the mortgagors should not redeem; and B. went into possession. The Master made his report on the 13th February, 1900, fixing the 14th August, 1900, as the day for redemption, and ascertaining the amount due by the defendants up to that day. On the 15th May an order was made amending the report by deducting amounts received by the plaintiffs for rent, and directing that any other rents received up to that time should be credited on the final adjustment. On the 15th August the defendants applied for a new day, when the plaintiffs stated on affidavit that sums paid by them for taxes and costs more than exhausted the rents received since the date of the report. No other statement was made by the plaintiffs. The application was refused, and on the 17th August a final order of foreclosure was granted:—

Held, that the statement of the plaintiffs was insufficient; the mortgagor, before a final order of foreclosure is made, is entitled to know how much he must pay in order that he may redeem; and the modes in which that amount may be ascertained, where it has been changed after report, are pointed out in Rule 387.

Held, also, that a purchaser who has purchased during the pendency of foreclosure proceedings, and whose rights are

expressly subject to the termination of the proceedings by a final order of the Court in favour of the mortgagee, stands in a different position from one who comes in for the first time after a final order has been made, and is much more readily made subject to the discretion of the Court to open the foreclosure.

Campbell v. Holyland (1877), 7 Ch. D. 166, and *Johnston v. Johnston* (1882), 9 P.R. 259, followed.

Gunn v. Doble (1869), 15 Gr. 655, distinguished.

In this case the mortgagors were in no default, an examination of the proceedings in the part of the purchaser would have shewn him that the mortgagors had never been properly foreclosed, and that no day had ever been fixed for payment of the balance due to the mortgagees. But he did not even ask whether a final order had been obtained, which was the condition upon which his sale was to be carried out:—

Held, therefore, that the mortgagors had clear rights to redeem; and, having come in promptly for relief and taken vigorous steps to assert their rights, they were entitled to have the final order of foreclosure set aside, a new account taken and a new day fixed, and to redeem both as against the plaintiffs and B., for which purpose the latter should be added as a party.

Held, lastly, that the sale to B. was not, under the circumstances, sustainable under the power of sale contained in the plaintiffs' mortgage.

Kelly v. Imperial Loan Co. (1885), 11 S.C.R. 516, distinguished. *Supreme Court of the Independent Order of Foresters v. Pegg*, 254.

See COSTS, 14.

MUNICIPAL CORPORATIONS.

See EVIDENCE, 3 — MANDAMUS.

NEGLIGENCE.

See EVIDENCE, 1.

NEW DAY.

See MORTGAGE.

NOTICE.

See ACTION, 2, 3.

NOTICE OF MOTION.

See EVIDENCE, 5 — INTERPLEADER, 1, 4.

NOTICE OF TRIAL.

Close of Pleadings — Rule 262.]—A reply delivered by the plaintiff joining issue upon the statement of defence, and further alleging that the facts

set forth in the defence were no answer to the claim:—

Held, a joinder of issue "simply, without adding any further or other pleading thereto," within the meaning of Rule 262; and therefore that when it was delivered the pleadings were closed, and a notice of trial thereupon served was regular. *Gibson v. Nelson*, 265.

See MECHANICS' LIENS.

NULLITY.

See JUDGMENT, 4.

PARTICULARS.

See PLEADING, 2.

PARTIES.

1. *Joining Plaintiffs without Authority — Motion by Defendants to Strike Out — Solicitor — Retainer — Sufficiency of — Corporate Seal — Costs.*]—Solicitors who began an action in the name of a public school board and an individual as plaintiffs were retained for the board by a special committee appointed by resolution of the board, not under the corporate seal; the purposes of the appointment, as stated on the face of the resolution, embraced the commencement of any action respecting the matters referred to and the employment of counsel, the sub-

ject of the action being one of such matters :—

Held, that this was not proper authority from the school board to the solicitors to bring the action, and the defendants had the right to have the name of the board as plaintiffs struck out.

Town of Barrie v. Weaymouth (1892), 15 P.R. 95, followed.

The solicitors having acted in good faith and under the belief that their retainer was sufficient, no costs were awarded. *Barrie Public School Board v. v. Town of Barrie*, 33.

2. *Third Party Notice — Agreement—Rule 209—Appearance—Leave to Appeal.*]—The plaintiffs' claim against the defendants was for the balance of a sum agreed to be paid for the hire of a race track. The defendants alleged that a ferry company had agreed with the plaintiffs to pay and contribute towards the hire of the track a certain sum for each day of the race meetings, in consideration of the increased travel, and that the defendants had thereby been induced to enter into the agreement with the plaintiffs.

Held, that this allegation was not sufficient to support a claim against the ferry company for contribution, indemnity, or any other relief over, within Rule 209; and therefore the defendants should not have been allowed to serve a third party notice.

Held, also, that the proper practice in moving against a third party notice, is to move without entering an appearance.

Leave to appeal refused. *Windsor Fair Grounds and Driving Park Association v. Highland Park Club*, 130.

See COSTS, 20—INTERPLEADER, 5—MORTGAGE—PARTITION—RE-VIVOR—STAY OF PROCEEDINGS.

PARTITION.

Summary Proceeding—Parties — Absentee — Guardian — Dispensing with Service—Substituted Service.]—Where, in a proceeding for partition or sale of lands, begun by summary application, a person interested in the estate, not originally made a party, had been long unheard of, and there was uncertainty whether he were living or dead, an order was made by a Judge, under secs. 16 to 20 of the Partition Act, R.S.O. ch. 123, which are expressly made applicable by sec. 33 of the Judicature Act, R.S.O. ch. 51, appointing a guardian and directing that he be served with an office copy of the judgment or order for partition, and notice, for the absentee.

Semble, that the Master to whom a reference is directed by the judgment or order has power to dispense with service of his warrant or of an office copy of the judgment: Rules 203, 659.

Smith v. Houston (1892), 15 P.R. 18, discussed.

Seem, also, that the Court or Judge has power to make an order for substituted service of an office copy of a judgment or order. *Re Hynes—Hodgins v. Andrews*, 217.

PAYMENT INTO COURT.

Infant's Fund—Trustee—Discretion—Costs—Taxation—Interlocutory Motion—Affidavits.]—The defendant, having in her hands a fund to the benefit of which the plaintiff, an infant, was entitled, asserted that, by the terms of the trust upon which she held it, she had a discretion as to the application of it for the benefit of the plaintiff. She nevertheless paid the money into a bank to her own credit as trustee for the plaintiff, and agreed that she would not use it except for his benefit, and would pay it to him at majority:—

Held, that the defendant was a mere trustee for the plaintiff, without the discretion which she contended for; and a summary order (made before delivery of statement of claim in an action to recover the fund and for an injunction) requiring the defendant to pay the fund into Court, and thereupon perpetually staying the action, was affirmed.

Re Humphries, Mortimer v. Humphries (1899), 18 P.R. 289, approved.

Where an interlocutory motion was dismissed upon preliminary objections:—

Held, that the taxing officer had a discretion to disallow to the party opposing it the costs of affidavits filed in answer to it. *Whitewood v. Whitewood*, 183.

See COSTS, ETC., 3, 12.

PAYMENT OUT OF COURT.

See APPEAL, 4—*MONEY IN COURT*.

PLEADING.

1. *Statement of Claim—Amendment—Conformity with Writ—Rule 300—Incorporated Company—Slander—Joinder of Causes of Action—Trial.*]—The writ of summons claimed damages against an incorporated company for wrongful dismissal and slander. The original statement of claim was confined to the former cause of action, but, after defence and before reply due, the plaintiff amended on *præcipe* by adding a claim for slander:—

Held, that it was competent for the plaintiff to do so, under Rule 300.

Seem, that an incorporated company may be liable if slander is spoken by its servants or agents in direct obedience to its orders; and

Held, that, at all events, the pleading setting up slander

should not be struck out summarily, but should be adjudicated on.

Leave to the defendants to have the question of law first determined.

The two causes of action were properly joined; but application might be made under Rule 237 to direct the method of trial. *Rodger v. The Noxon Company*, 327.

2. *Copyright in Book—Registration—Infringement—Particulars.*]—In an action for infringement of copyright in a book, the statement of claim alleged that the plaintiffs were the proprietors of a subsisting copyright duly registered, and further alleged that the defendants printed for sale a large number of copies of another book, a part whereof was an infringement of the plaintiffs' copyright:—

Held, that the defendants were entitled to particulars shewing the date of registration of the plaintiffs' copyright, and shewing what part of the defendants' book infringed the plaintiffs' right.

Sweet v. Maugham (1840), 11 Sim. 51, not followed.

Mawman v. Tegg (1826), 2 Russ. 385, 390, and *Page v. Wisden* (1869), 20 L.T.N.S. 435, followed. *Liddell v. Copp-Clark Co.*, 332.

See APPEAL, 5—COSTS, 3, 13—JUDGMENT, 3, 4—MECHANICS' LIENS—NOTICE OF TRIAL—VENUE, 2.

POWER OF SALE.

See MORTGAGE.

PREROGATIVE WRIT OF MANDAMUS.

See MANDAMUS.

PRODUCTION.

See DISCOVERY, 2—EVIDENCE, 3.

RECEIVER.

Equitable Execution—Claim against Crown—Distribution of Fund—Creditors' Relief Act—Undertaking.]—The plaintiff and defendant were partners, and as such had a claim against the Crown for work done, which resulted in the payment of a large sum. Subsequently the partnership made a further claim for interest on the sum paid, which was rejected, and could not have been enforced by a petition of right. The Crown, however, without admitting any liability, offered a sum in satisfaction of the claim for interest, and an appropriation was made by Parliament to enable that to be done, but the appropriation lapsed. A Minister of the Crown afterwards offered to pay the defendant half the amount of the appropriation, and the defendant agreed to accept it. Accordingly a sum was voted by Parliament for this purpose, and by an order-in-council

authority was granted to pay it to the defendant :—

Held, that on the date of the order-in-council there existed a debt due by the Crown to the defendant, arising out of contract, and recoverable by petition of right.

Held, also, that this sum could be made available for satisfaction of a judgment recovered by the plaintiff against the defendant.

Willcock v. Terrell (1878), 3 Ex. D. 323, and *Manning v. Mullins*, [1898] 2 I.R. 34, followed.

The fact that the Crown is the debtor does not stand in the way of the Court going as far as it can go, without directing or assuming to direct what shall be done by the Crown, towards making such an asset of a judgment debtor available to satisfy the claim of his judgment creditor.

Upon the plaintiff undertaking that the fund, if and when it should come to the hands of the receiver, should be applied as if it had come to the hands of the sheriff under the Creditors' Relief Act, an order was made restraining the defendant from receiving the fund, authorizing a receiver to receive it, and providing that his receipt should be a sufficient discharge to the department or officer making payment. *Stewart v. Jones*, 227.

[Reversed, 29th January, 1901.]

See ATTACHMENT OF DEBTS.

REFERENCE.

See COSTS, 3, 4, 5 — LOCAL MASTER.

RENEWAL.

See WRIT OF SUMMONS, 2.

REPORT.

See APPEAL, 2.

RESIDENCE OF PLAINTIFF.

See VENUE, 2.

RETAINER.

See PARTIES, 1—SOLICITOR, 1.

REVIVOR.

Substituted Plaintiff — Absence of Consent—Liability for Costs—Transfer of Right Pendente Lite—Stay of Proceedings.—It may, in rare cases, such as *Chambers v. Kitchen* (1894), 16 P.R. 219, be necessary and desirable "under Rule 396 to add or substitute a person as plaintiff, without the consent required by Rule 206 (3), upon the application of the opposite party; but where it becomes necessary to substitute a person as plaintiff without his consent, to prevent injustice, he should not be exposed, without some further action on his part or adoption by him of the position into which he is forced, to

any liability for damages or costs.

Under the circumstances of this case, the fact that F. had become *pendente lite* the transferee of the promissory note sued on did not entitle the defendants to an order substituting him as plaintiff and making him liable for the costs of the action.

But the original plaintiff could not be allowed to prosecute the action further, because he had no longer any interest in it, and F. could not be allowed to do so because he had not caused himself to be substituted as a plaintiff, nor obtained leave to proceed in his own name upon the judgment pronounced in favour of the plaintiff, which had not been entered, but from which the defendants sought to appeal; and all further proceedings in the action should, therefore be stayed, but without costs. *Murray v. Wurtele*, 288.

See ACTION, 2, 3 — ATTACHMENT OF DEBTS—COSTS, 13.

SEAL.

See PARTIES, 1

SECURITY FOR COSTS.

See APPEAL, 4—COSTS, 18, 19, 20 — EVIDENCE, 5—INJUNCTION, 2.

SERVICE OF PAPERS.

See APPEAL, 5—DISCOVERY, 3 — INTERPLEADER, 1, 4—JUDGMENT, 4—MECHANICS' LIENS—PARTITION—WRIT OF SUMMONS, 1, 2.

SET-OFF.

See COSTS, ETC., 7, 12, 13.

SETTLEMENT OF ACTION.

See ACTION, 1.

SHERIFF.

See INTERPLEADER, 2, 6.

SLANDER.

See COSTS, ETC., 8 — JUDGMENT, 2—PLEADING, 1.

SOLICITOR.

Charging Order — Recovery of Land—Rule 1129—Execution—Priorities.] — An action having been begun on the 3rd June, 1896, judgment was obtained therein on the 27th October, 1896, declaring the plaintiffs' right to an interest in certain lands. An execution against the plaintiffs' lands was placed in the sheriff's hands on the 29th April, 1897. On the

1st September, 1897, Con. Rule 1129 was passed, by which the Court was enabled to order that lands recovered by the exertions of a solicitor should be charged for his benefit :—

Held, that the execution bound the plaintiffs' interest in the lands from the 29th April, 1897, and the subsequent enactment of the Rule did not operate to divest this charge, or to postpone the claim of the execution creditors to the subsequently acquired equity of the solicitors in respect of their costs of the action. *Taylor v. Robinson*, 31.

2. *Bill of Costs—Delivery—Taxation—R.S.O. ch. 174—Employment—Transaction of Business—Foreign Estate—Scope of Business—Agreement—Benefit to Solicitor—Public Policy—Inherent Jurisdiction.*]

—The jurisdiction granted by the provisions of the Act respecting solicitors, R.S.O. ch. 174, to order the delivery of a bill of fees, charges, or disbursements for business done by a solicitor as such, is distinct from and independent of the jurisdiction thereby granted to order the same to be taxed; and there is power to order delivery of a bill whether it has been paid or not, and whether or not it is one which the Court would have power to refer to taxation.

Duffett v. McEvoy (1885), 10 App. Cas. 300, *Re West*, [1892]

2 Q.B. 102, and *Re Baylis*, [1896] 2 Ch. 167, followed.

Where the employment of a solicitor is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, the Court will exercise its summary jurisdiction over him.

Re Aitkin (1820), 4 B. & Ald. 47, followed.

Solicitors in Ontario being employed to transact business in relation to a claim of their client upon an estate in England :—

Held, that they were employed because they were solicitors, and the business was within the scope of the business of solicitors, and it made no difference that the estate was in England, for they were employed in Ontario and the business was transacted there.

Held, also, that an agreement that the solicitors should retain \$500 as commission for business done and to be done could not stand in the way of the taxation of the solicitors' bill, for such an agreement is against the policy of the law, and solicitors cannot enter into any stipulation on the terms of getting a better benefit than they would get by the costs which they are entitled to charge. The agreement was void as being for business done and to be done, and upon the taxation it should be disregarded.

Held, lastly, that the Act respecting solicitors did not deprive the Court of its inherent jurisdiction over them as officers of the Court. *Re McBrady and O'Connor, Solicitors*, 37.

3. *Bills of Costs—Taxation—Payment—Connected Charges—Agreement—Unsigned Bills—Delay—Overcharges.*]—A firm of solicitors for about eight years acted for an estate in the collection of moneys and realization of securities relating to a block of land sold by the testator. During this period the solicitors from time to time rendered statements of account to the executors and paid them cheques for balances in their hands as shewn by such statements, and also rendered detailed bills of their costs for their services, in respect of different actions and proceedings taken, though not in all cases, such bills being paid by the retention by the solicitors, without objection on the part of the executors, of part of the moneys collected. Two or three of the larger bills were moderated by a taxing officer shortly after they were rendered. Upon an application by the executors for taxation of all the bills after the eight years :—

Held, that this could not be regarded as one continuous dealing keeping the right to tax in suspense till the collection or exhaustion of all the securities.

Held, also, upon the evidence, that there was no agreement between the solicitors that the right to tax generally should remain open to the executors.

As to certain of the bills of costs said not to have been actually signed by the solicitors :—

Held, that they were substantially sufficient, and, after being paid out of the funds collected, with the knowledge and sanction of the executors, they could not be treated as open to taxation, after years of delay and no specific overcharges being indicated.

In re Sutton and Elliott (1883), 11 Q.R.D. 377, followed. *Re Beaty et al., Solicitors*, 271.

See ACTION, 1—COSTS, 1—PARTIES, 1.

SPECIAL INDORSEMENT.

See JUDGMENT, 5.

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<i>See</i> MANDAMUS.	

STAY OF PROCEEDINGS.

Prior Action Pending—Parties.]—In this action the plaintiffs sought to recover from the defendants a large sum of money, being the portion assessed upon the defendants of the cost of certain drainage works constructed and paid for by the plaintiffs. In a previous action against the same defendants, the plaintiffs therein, who were land-owners in the defendants' township and assessed for a portion of the sum now sued for, sought a declaration that the defendants' by-laws purporting to impose this assessment upon the plaintiffs therein, and

all the proceedings upon which they were founded, were void, and an injunction to restrain any proceedings for the collection of the amount for which the plaintiffs therein were assessed. In that action judgment had been given in the defendants' favour, but the plaintiffs had an appeal to the Supreme Court of Canada pending when the present action was brought:—

Held, that the present action should not be stayed until after the determination of the appeal in the other. *Township of Tilbury West v. Township of Romney*, 242.

See APPEAL, 1, 4—INJUNCTION, 2—REVIVOR.

SUMMARY JUDGMENT.

See JUDGMENT, 5, 6, 7.

SUPREME COURT OF CANADA.

See APPEAL, 4.

TAXATION OF COSTS.

See COSTS, 14, 17—PAYMENT INTO COURT — SOLICITOR, 2, 3.

TENDER.

See COSTS, 3.

THIRD PARTY NOTICE.

See PARTIES, 2.

TIME.

See ACTION, 2, 3—APPEAL, 2
— COSTS, 15, 16—MECHANICS'
LIENS—VENUE.

TRIAL.

See JUDGMENT, 7 — JURY
NOTICE—MECHANICS' LIENS—
NOTICE OF TRIAL—PLEADING, 1.

TRUSTEE.

See PAYMENT INTO COURT.

UNDERTAKING.

See ALIMONY—RECEIVER.

VENUE.

1. *Writ of Summons*—*Indorsement*—*Election*—*Rules 138 (2), 529.*—Where in the special indorsement of his writ of summons the plaintiff names a place of trial, he is not at liberty to change by naming another place in his statement of claim. Rule 529 must be read subject to the provision of Rule 138 (2). *Segsworth v. McKinnon*, 178.

2. *Residence of Plaintiff*—*Statement of Claim*—*Rule 529 (b).*—Rule 529 provides that: (a) the plaintiff shall, in his statement of claim, name the county town at which he proposes that the action shall be tried; (b) where the cause of action arose and the parties

reside in the same county, the place so to be named shall be the county town of that county:—

Held, that the residence of the plaintiff at the time of the delivery of the statement of claim, and not at the time of the issue of the writ of summons, is the time referred to in Rule 529 (b). *Edsall v. Wray*, 245.

WILL.

See COSTS, 9.

WORDS.

“*Costs in the cause.*”]—See COSTS, ETC., 15.

“*Costs in the cause to the successful party.*”]—See COSTS, ETC., 16.

“*Costs of the action under this Act,*” in R.S.O. ch. 153, sec. 41.]—See COSTS, ETC., 11.

“*Joinder of issue,*” in Rule 262.]—See NOTICE OF TRIAL.

“*Necessary and desirable,*” in Rule 396.]—See REVIVOR.

“*Only the amount of the cash disbursements actually and properly made by the plaintiff's solicitor,*” in Rule 1144.]—See ALIMONY.

“*Plaintiff,*” in Rule 1198.]—See COSTS, ETC., 20.

WRIT OF POSSESSION.

See INTERPLEADER, 4.

WRIT OF SUMMONS.

1. *Substituted Service—Foreign Corporation—Rules 146, 167.*—Service of process must be, if possible, personal, or, in the case of a corporation, upon the duly constituted agent; the substitutional method is to be followed only when prompt personal service appears by affidavit to be unavailable.

Rule 146 regulates substituted service of process. Rule 167 covers miscellaneous proceedings in the progress of litigation, but it is not to be used so as to nullify the special Rule applicable to writs of summons.

And where the plaintiff shewed that he knew where the head office of the defendants, a foreign corporation, was, and that they had no office or definite place of business within Ontario, and there was nothing to shew that

they could not be easily served at the head office, an order for substituted service was vacated. *Young v. Dominion Construction Co.*, 139.

2. *Renewal—Service—Rule 132.*—The time allowed for renewal of a writ of summons is, upon the proper construction of Rule 132, to be reckoned *inclusive* of the date of issue or of a former renewal.

Black v. Green (1854), 15 C.B. 262, 3 C. L. R. 38, and *Anon.* (1863), 11 W.R. 293, 32 L.J.N.S. Ex. 88, 7 L.T.N.S. 718, followed.

Where the original writ of summons was issued on the 5th November, 1898, and was renewed on the 4th November, 1899, the renewal ran out on the 3rd November, 1900, and service thereafter was of no effect. *Laird v. King*, 307.

[Affirmed 16th February, 1901.]

See JUDGMENT, 4—MECHANICS' LIENS — PLEADING, 1 — VENUE, 1.



